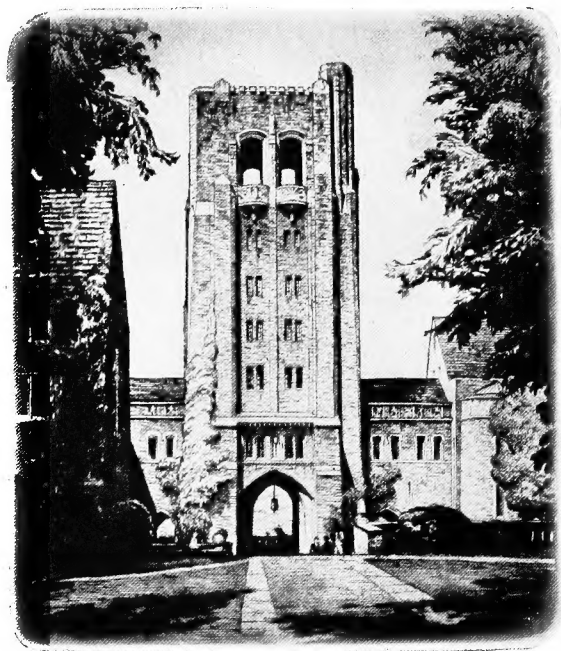


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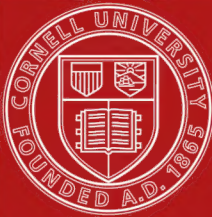
Handbook of the law of banks and banking



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HANDBOOK
OF THE
LAW OF BANKS AND
BANKING

By FRANCIS B. TIFFANY

J. CHANAN
AUTHOR OF "DEATH BY WRONGFUL ACT" AND HANDBOOKS ON
"SALES" AND "PRINCIPAL AND AGENT"

ST. PAUL, MINN.
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PREFACE

THE object of this book is to present the law of the subject in brief compass, in accordance with the plan of the Hornbook Series. The author has had in view, however, that the subject is one that concerns rather practitioners than law students, and for this reason he has covered many questions in the text and notes that might have been omitted, had the book been intended primarily for law students, and he has made a fuller citation of the decisions than he would otherwise have done. The fundamental part of the law of banks and banking relates to the various transactions between banks and bankers and those dealing with them. The author has not entered upon the field of corporation law, except so far as the law of banking corporations seemed to require special discussion, and he has not dealt with the varying statutory provisions of the different states respecting banking corporations; but he has endeavored to cover the field of national banks and the National Bank Act, so far as it is affected by the decisions. The National Bank Act and other provisions of the federal statutes relating to national banks are printed in an Appendix, with historical and explanatory notes prepared by the editorial staff of the publishers. When treating of questions concerning checks and other negotiable instruments, the author has referred to the Negotiable Instruments Law, and has pointed out the not infrequent changes introduced by it.

With a view to making the book, so far as possible within its scope, an index to the cases, the publishers have supplemented the notes by references, prepared by their editorial staff, to the American Digest System, both to the Century and to the Decennial (Key-Number) Digests. These citations will enable any one who consults the book, not only to turn quickly to additional cases upon the particular point to which the note refers, but by means of the Key-Number to command the later cases which may be found in the digests hereafter published.

F. B. T.

ST. PAUL, JUNE 20, 1912.

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HANDBOOK

OF THE

LAW OF BANKS AND BANKING

CHAPTER I

INTRODUCTORY

1. Banking.
2. Bank—Banker.
3. Kinds of Banks.

BANKING

1. The business of banking consists primarily in the receiving by a corporation or a person engaged therein, called a bank or a banker, of the money of others upon general deposit—that is, subject to repayment upon demand or order—and in the employment of such money by the bank or banker for its or his own benefit in making advances to others by way of loan and of discount of promissory notes and bills of exchange. To the functions of receiving deposits and of loaning and discounting may be added a third, that of issuing bank notes, or the promissory notes of the bank or banker, for use in general circulation as a substitute for money. The business of banking usually includes also the buying and selling of exchange, coin, and bullion, the remission of money, the collection of commercial paper, and the receiving of special deposits.

BANK—BANKER

2. Where the business of banking is conducted by a corporation thereto empowered, the corporation is usually termed a "bank," and where the business is conducted by an individual or by a firm, the individual or the firm is termed a "banker" or "bankers." The term "bank" is also used to designate the building or office where such business is conducted.¹

Banking—Essential Functions

Banks, it is often said, are of three kinds: Banks of deposit, which receive money on deposit; banks of discount, which loan money on collateral, or by means of discount of

¹ The following are some of the definitions of "bank":

"A bank is an institution, usually incorporated, with power to issue its promissory notes intended to circulate as money (known as bank notes); or to receive the money of others on general deposit, to form a joint fund that shall be used by the institution for its own benefit, for one or more of the purposes of making temporary loans and discounts, of dealing in notes, foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money; or with both these powers, and with the privileges, in addition to these basic powers, of receiving special deposits, and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business." Morse, *Banks & B.* (4th Ed.) § 2.

"An institution, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes (usually known by the name of bank notes), or to perform one or more of these functions." Bouvier, *L. Dict.*, quoted in *Reed v. People ex rel. Hunt*, 125 Ill. 592, 596, 18 N. E. 295, 1 L. R. A. 324; *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 203, 23 Am. Rep. 683.

"An association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, called 'bank notes.'" Rapalje & L. L. *Dict.* (quoted in *Wells, Fargo & Co. v. Northern Pac. R. Co.* [C. C.] 10 Sawy. 441, 23 Fed. 469, 471). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 2; *Cent. Dig.* § 2.

commercial paper; and banks of circulation, or of issue, which issue bank notes, payable on demand to bearer.² It is doubtless true that there have existed so-called banks which exercised only the function of receiving deposits and paying out to the depositor an equivalent amount upon demand.³ And it is also true that there have existed banks of circulation which did not receive deposits.⁴ But an institution that merely exercised the function of discount, neither receiving deposits nor issuing bank notes as a means of obtaining funds with which to make advances, would not be a bank.⁵

² *Oulton v. German Savings & Loan Soc.*, 17 Wall. 109, 21 L. Ed. 618; *Wells, Fargo & Co. v. Northern Pac. Ry. Co.* (C. C.) 10 Sawy. 441, 23 Fed. 469, 471; *Reed v. People ex rel. Hunt*, 125 Ill. 592, 596, 18 N. E. 295, 1 L. R. A. 324; *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 203, 23 Am. Rep. 683; *Bouvier, L. Dict.*; *Rapalje & L. L. Dict.* See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 2; *Cent. Dig.* § 2.

³ A bank of this obsolete type was the Bank of Amsterdam. See *Dunbar, Theory & History of Banking*, 18, 82 et seq.

In *Western Invest. Banking Co. v. Murray*, 6 Ariz. 215, 56 Pac. 728, it was held that a corporation which received money, invested it for its depositors by loaning it in their names, and collected rents and interest due on such loans, such rents and interest being subject to check by those for whom they were collected, charging a commission to them, as well as to borrowers, was a bank. Here, the only banking function exercised was that of deposit, which was confined to the funds after collection.

Under an act declaring the receiving of money on deposit as a regular business by a person or corporation to be a banking business, whether the deposit is made subject to check or is evidenced by a certificate of deposit, pass book, note, receipt, or other writing, a department store which received deposits up to a certain amount, issued pass books, paid interest on the amounts deposited, and paid the principal, with interest thereon, on demand, in money or goods at the election of the depositor, was engaged in the banking business. *McLaren v. State*, 141 Wis. 577, 124 N. W. 667, 135 Am. St. Rep. 55. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 2; *Cent. Dig.* § 2.

⁴ *Bagehot, Lombard Street*, § 4.

⁵ "Banks in the commercial sense," says Clifford, J., in *Oulton v.*

It is of the essence of the business of banking, as it is conducted to-day, that the bank or banker should receive on deposit the money and funds of other persons.⁶ The distinctive function of the banker begins as soon as he uses the money of others; so long as he uses his own money, he is only a capitalist.⁷ In exercising the function of discount, banks and bankers do, indeed, use their own capital, as well as the funds received from deposits and their bank notes, if they issue bank notes; but an institution that practices only dis-

German Savings & Loan Soc., 17 Wall. 109, 21 L. Ed. 618, "are of three kinds—of deposit, of discount, and of circulation. Originally the banking business consisted in receiving deposits, such as bullion, plate, and the like, for safe-keeping, until the depositor should see fit to withdraw. Later, bankers began to loan by discounting bills and notes, or on mortgage, pawn, or other security; and, at a still later period, to issue notes of their own, intended to circulate as money, instead of gold and silver. Modern banks frequently exercise any two, or even three, of those functions; but it is still true that an institution prohibited from exercising any more than one of them is a bank in the strictest sense." This statement is open to criticism, so far as concerns the dictum that an institution exercising only the function of discount would be a bank. See Morse, Banks & B. (4th Ed.) § 2. But see McLaren v. State, 141 Wis. 577, 124 N. W. 667, 135 Am. St. Rep. 55. Cf. Earle v. American Sugar Refining Co., 74 N. J. Eq. 751, 71 Atl. 391.

The internal revenue act of the United States defines a bank or banker as follows: "Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or banker." Rev. St. U. S. § 3407 (U. S. Comp. St. 1901, p. 2246). This definition is only for the purposes of taxation, and is not to be taken as a definition of a bank or banker for all purposes. See "*Banks and Banking*," Dec. Dig. (Key No.) § 2; Cent. Dig. § 2.

⁶ Morse, Banks & B. (4th Ed.) § 177.

⁷ Bagehot, Lombard Street, 21, quoting Ricardo.

count, without receiving deposits or issuing bank notes is simply an investor of its own money, as any individual may be.⁸ As has been already said, banks formerly existed which did not receive deposits, and which derived their only means of discounting by using (in addition to their capital) their own engagements, in the form of bank notes, for the payment of money upon demand. Indeed, the issue of bank notes was at one time regarded as the primary and distinguishing function of banking, and an institution that did not issue them was not regarded as a bank.⁹ In its analysis, the obligation of a bank to its depositors is essentially the same as its obligation to the holders of its bank notes; that is, it is an obligation to pay money upon demand, so that in each case the means of discount is derived from the use in one form or the other of its own engagement to pay money upon demand.¹⁰ Speaking broadly, therefore, banking may be defined as the exercise either of the function of receiving deposits or of the function of issuing notes, or of both functions, and in addition the

⁸ *Life Ass'n of America v. Levy*, 33 La. Ann. 1203; *Hubbard v. New York & H. R. Co.*, 36 Barb. (N. Y.) 286; *People v. Brewster*, 4 Wend. (N. Y.) 498; *Oregon & W. Trust Inv. Co. v. Rathburn*, 5 Sawy. 32, 18 Fed. Cas. 555. See Dunbar, *Theory & History of Banking*, 18. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 2; *Cent. Dig.* § 2.

⁹ See *Bagehot*, *Lombard Street*, 97; Dunbar, *Theory & History of Banking*, 96.

This conception of the function of a bank survives in the language of some of the state constitutions, which prohibit the legislature from granting charters for "banking purposes," or prohibit the exercise of the privilege of "banking"; the intent being merely to prohibit the issue of bank notes, and not to prohibit the practice of receiving deposits and of discount. See *Bank of Sonoma County v. Fairbanks*, 52 Cal. 196; *Bank of Martinez v. Hemme Orchard & Land Co.*, 105 Cal. 376, 38 Pac. 963; *State ex rel. Stone v. Union Stock Yards State Bank*, 103 Iowa, 549, 70 N. W. 752; *Dearborn v. Northwestern Sav. Bank*, 42 Ohio St. 617, 51 Am. Rep. 851. See, also, *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 197; *Cent. Dig.* §§ 743-751.

¹⁰ Dunbar, *Theory & History of Banking*, 16 et seq.

function of making advances by way of loan or discount.¹¹ But having in view the manner in which banking is conducted to-day, it is not too much to say that it is of the essence that the function of receiving deposits be exercised, and that the exercise of this function, together with that of using the fund created by the deposits in discounting, are the primary and essential features of banking. The additional function of issuing bank notes may or may not be exercised. In the United States to-day only the national banks issue bank notes; but the business of banking is conducted also by deposit banks, which do not exercise the right of issuing such notes.

Other Functions

In addition to exercising the functions of deposit and discount, and of issue where this is authorized, the business of banking usually includes the employment of the deposits of the bank in buying and selling exchange, coin, and bullion, and also the remission of money, the collection of commercial paper, and the receiving of special deposits. These various kinds of business are engaged in by bankers because they are convenient and profitable, but they are not confined to banks and bankers. A corporation is not a bank, nor is an individual a banker, because of engaging in some or all of these activities, so long as they are not accompanied by the receipt of general deposits or the issue of bank notes. The business of collecting commercial paper by a bank, however, usually involves the crediting of the proceeds of the collection to the deposit account of the customer, and in that case involves a banking function.

¹¹ "Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker." *Warren v. Shook*, 91 U. S. 704, 23 L. Ed. 421.

Cf. *People v. Bartow*, 6 Cow. (N. Y.) 290. See *Banks and Banking*, "Dec. Dig. (Key No.) §§ 2, 120, 176; Cent. Dig. §§ 2, 293, 253.

KINDS OF BANKS

3. Banks are classified, according to the functions which they exercise, as (1) banks of deposit; (2) banks of discount; and (3) banks of issue. But all commercial banks to-day exercise at least the two first functions, and some of them exercise also the third.

Banks are also classified as (1) commercial banks, in which the business is conducted for the benefit of the bank itself; and (2) savings banks, in which the business is conducted for the benefit of the depositors.

Banks are also classified as (1) private, or unincorporated banks; and (2) incorporated banks, which include in this country (a) state banks, or banks incorporated under state law; and (b) national banks, or banks incorporated under federal laws.

Kinds of Banks

The classification of banks as banks of deposit, banks of discount, and banks of circulation or issue has been considered. Banks are also classified as commercial banks and non-commercial or savings banks. In a commercial bank, the business of banking is carried on in the manner already indicated for the benefit of the bank itself; that is, for the benefit of the stockholders, if it be incorporated, or for the benefit of the person or persons engaged in the business, if it be carried on by a single individual or by a firm. A savings bank, on the other hand, is carried on for the benefit of the depositors; the funds derived from deposits being loaned or invested in mortgages, bonds, stocks, or other securities authorized by the law under which the bank is incorporated. Savings banks do not carry on the business of banking in the ordinary or commercial sense, and they will be made the subject of a separate chapter. Banks, using the term broadly,

may also be classified as incorporated and unincorporated.¹² Incorporated banks in the United States may again be classified as national banks, or banks incorporated under the federal statutes, and state banks, or banks incorporated under the statutes of the several states. National banks will be made the subject of a separate chapter.¹³

Right to Engage in Banking

At common law banking is open to all persons.¹⁴ Deposit and discount, and, if no statutory prohibition exists, issue as well,¹⁵ may therefore be carried on by individuals and firms, as well as by banking corporations. The legislatures, however, have power to forbid individuals or firms, as well as corporations, from engaging in banking unless they conform to legislative requirements;¹⁶ and it has been held that in the

¹² See *Davis v. McAlpine*, 10 Ind. 137; *Norton v. Jewett*, 12 Ind. 426; *Way v. Butterworth*, 106 Mass. 75; *Den ex dem. State v. Helmes*, 3 N. J. Law, 1051, 1057; *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1, 32; *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 2; *Cent. Dig.* § 2.

¹³ *Post*, p. 360.

¹⁴ See *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274.

While the right to do a banking business is not a franchise, yet the right to carry on such business through the agency of a corporation is a franchise, dependent on a grant of corporate powers by the state. *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1.

¹⁵ *Post*, p. 256.

¹⁶ *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062; *Engle v. O'Malley*, 219 U. S. 123, 31 Sup. Ct. 190, 55 L. Ed. 128; *Assaria State Bank v. Dolley*, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123; *Nance v. Hemphill*, 1 Ala. 551; *Ex parte Pittman*, 31 Nev. 43, 99 Pac. 700, 22 L. R. A. (N. S.) 266; *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447; *State v. Richcreek*, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491; *Blaker v. Hood*, 53 Kan.

exercise of the police power they may restrict the right of banking, not only the exercise of the function of issue, but the exercise of the functions of deposit and discount as well, to corporations organized for that purpose—in other words, that while the right to engage in banking is not essentially a corporate franchise, the legislature may make it such.¹⁷ “The matter of regulating and prohibiting private banking, and all banking not expressly authorized by law, is strictly within the legislative discretion, under that branch of the police power relating to the public safety, and * * * the courts will not interfere and declare such legislation unconstitutional as an evasion of individual rights.”¹⁸

Order of Treatment

The fundamental part of the law relating to banks and banking concerns the business of banking in all the various kinds of transactions between banks and those dealing with

499, 36 Pac. 1115, 24 L. R. A. 854; *Cummings v. Spaunhorst*, 5 Mo. App. 21; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *People v. Bartow*, 6 Cow. (N. Y.) 290; *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275; *State v. Struble*, 19 S. D. 646, 104 N. W. 465; *State v. Williams*, 8 Tex. 255; *McLaren v. State*, 141 Wis. 577, 124 N. W. 667, 135 Am. St. Rep. 55. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* § 9.

¹⁷ *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062; *Shallenberger v. First State Bank of Holstein, Neb.*, 219 U. S. 114, 31 Sup. Ct. 189, 55 L. Ed. 117; *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; *Weed v. Bergh*, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217. See, also, *State v. Stebbins*, 1 Stew. (Ala.) 299; *Nance v. Hemphill*, 1 Ala. 551; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *Morse, Banks & B.* (4th Ed.) § 13. Contra: *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756; *Marymont v. Nevada State Banking Board (Nev.)* 111 Pac. 295, 32 L. R. A. (N. S.) 477. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* § 9.

¹⁸ *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* § 9.

them. Whether the bank be a national bank, a state bank, an individual, or a firm is a subordinate matter. The business done by all may be exactly the same, and it is done in substantially the same way. The legal questions arising out of such business constitute the great bulk of the law of banking, and are but little affected by special regulations, restrictions, and considerations applicable to particular kinds of banks. This fundamental part of the law will, therefore, be first discussed. The law in its particular application to banking corporations will be made the subject of later chapters.

CHAPTER II

DEPOSITS

4. **Kinds of Deposits—General Deposit.**
5. Special Deposit.
6. Deposit for Specific Purpose.
7. **Receipt and Entry of General Deposits—By Whom Received.**
8. Entry in Pass Book.
9. **Deposit of Paper—Deposit for Collection.**
10. Sale or Deposit for Collection.
11. Check on Depository.
12. **Title to and Disposition of General Deposits—In General.**
13. Deposit by Trustee.
14. Deposit by Agent.
15. Deposit in Name of Third Person.
16. Assignment, Attachment, etc.
17. **Payment—In General.**
18. Interest.
19. **Bank's Lien or Right of Set-Off—In General.**
20. Deposit Made and Debt Owing in Different Capacities.
21. Right of Surety to Have Deposit Applied.
22. **Set-Off by Depositor.**
23. **Certificate of Deposit—Definition and Effect.**
24. Necessity of Demand.
25. **Overdrafts.**
26. **Statement of Account—Effect.**
27. Duty of Depositor.
28. **Action for Deposit—Demand and Limitation.**
29. Burden of Proof.

KINDS OF DEPOSITS

4. **GENERAL DEPOSIT—Where money is received by a bank from a customer upon an agreement, express or implied, that the bank may mingle the money with its own funds and shall repay upon demand or order an equivalent amount, the transaction is termed a "general deposit." In such case the relation between the bank and its customer is that of debtor and creditor.**

5. **SPECIAL DEPOSIT**—Where money or any other thing is received by a bank for safe-keeping and return of the identical money or thing, the transaction is termed a “special deposit.” In such case the relation between the bank and the depositor is that of bailee and bailor. Where the bailment is gratuitous, the bank is liable only for such loss as results from its gross negligence.
6. **DEPOSIT FOR SPECIFIC PURPOSE**—Where money is received by a bank, not for deposit on general account or for safe-keeping and return, but to apply to a specific purpose, the transaction is often termed a “specific deposit.” In such case, although the money is to be mingled with the bank’s own funds, it is generally, but not universally, held that the bank holds the deposit or fund as a trustee.

General Deposit—Relation Between Bank and Depositor

As has already been explained, the receiving of general deposits is an essential function of modern banking.¹ The deposits, indeed, furnish the principal fund with which the business is carried on, even in the case of banks that issue bank notes.

From the nature of banking, which contemplates the employment by the bank of the funds of many persons in the making of loans and discounts and the other activities of the bank, it must have the right to mingle the general deposits in a common fund, together with the moneys it may derive from its capital and other sources. Moneys received by the bank on general deposit, therefore, pass into its ownership, and the relation created thereby between the bank and the depositor is in no sense fiduciary, but is merely that of debtor and creditor. The depositor has the right to demand, not the specific coins or notes deposited, but an equivalent amount of money.²

¹ Ante, p. 4.

² *Foley v. Hill*, 2 H. L. Cas. 278; *Marine Bank v. Fulton County Bank*, 2 Wall. 252, 17 L. Ed. 785; *National Bank of the Republic v.*

"Money, when paid into a bank," it was said in a leading case, "ceases altogether to be the money of the principal. It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid in to the banker is money known by the principal to be placed there for the purpose of being under the control of the banker. It is then the banker's money. He makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with as he pleases. He is guilty of no breach of trust in employing it. He is not answerable to the principal if he puts it in jeopardy. If he engages in a hazardous speculation, he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. * * * That being established to be the relative situation of the banker and customer, the banker is not an agent or factor, but a debtor."³

Millard, 10 Wall. 152, 19 L. Ed. 897; Balbach v. Frelinghuysen (C. C.) 15 Fed. 675; In re Salmon (D. C.) 145 Fed. 649; Collins v. State, 33 Fla. 429, 15 South. 214; McGregor v. Battle, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185; Union Nat. Bank v. Citizens' Bank, 153 Ind. 44, 54 N. E. 97; Taft v. Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387; Neely v. Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802; Bank of Marysville v. Windish-Muhlhauser Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Bank of Blackwell v. Dean, 9 Okl. 626, 60 Pac. 227; In re Prudential Trust Co.'s Assignment, 223 Pa. 409, 72 Atl. 798; Pendleton v. Commonwealth, 110 Va. 229, 65 S. E. 536; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 119; *Cent. Dig.* §§ 289-292.

³ *Foley v. Hill*, 2 H. L. Cas. 278, per Lord Cottenham. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 119; *Cent. Dig.* §§ 289-292.

Same—Payment of Deposits

It is the right of the depositor to receive payment upon demand, unless the agreement to that effect which is otherwise implied is varied by special agreement.⁴ Usually the depositor's demand is made by drawing an order upon the bank, in the form of a check, for the payment of the whole or a part of the amount to himself, or to some other designated person, or to the order of such person, or to bearer;⁵ and the bank's honor of the check is a payment of its indebtedness to that amount. The indebtedness of a bank to a customer is thus a constantly varying amount, from time to time increased by fresh deposits, and decreased by payment of his checks. Sometimes, however, the implied agreement may be varied by the issue by the bank to the depositor of a certificate of deposit, making the entire amount payable either on demand or at a designated time, to the depositor or to his order.⁶ In this case the amount due is payable only upon surrender of the certificate to the bank, and the deposit is not subject to check.⁷

The rights of the depositor are merely those of a creditor. If the bank without his authorization pays out money and charges it to his account, he cannot follow the money and reclaim it in the hands of the person to whom it was paid, even if the latter had notice that the payment was unauthorized, since the bank has a right to pay its own money to whomsoever it may choose, and its indebtedness to the depositor is not discharged by an unauthorized payment.⁸ So, in the event of the bank's failure, the depositor is entitled to no preference over the other general creditors;⁹ although if the bank received the deposit with knowledge of its insolvency it holds

⁴ Post, p. 75.

⁶ Post, p. 75.

⁵ Post, p. 96.

⁷ Post, p. 75.

⁸ *Davis v. Smith*, 29 Minn. 201, 12 N. W. 531; post, p. 148. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129, 133; *Cent. Dig.* §§ 312, 339-352.

⁹ Post, p. 349.

the money as trustee, and the depositor may follow the fund if it can be identified and recover it from the receiver or assignee.¹⁰

Same—Duty to Receive Deposits

It is almost superfluous to say that the right to receive deposits, even in the case of a banking corporation deriving its banking powers from its charter, does not imply a corresponding duty to receive deposits.¹¹ A bank may decline to do business with those whom, for any reason, it does not wish to serve, and may close an account at any time by tendering to the depositor the amount due and declining to receive more.¹²

Special Deposits

In the case of a special deposit, the identical money or other thing deposited is to be returned, and the bank consequently does not acquire the ownership in the thing, but is merely intrusted with its temporary custody for safe-keeping. The relation between the bank and the special depositor is therefore not that of debtor and creditor, but of bailee and bailor.¹³

¹⁰ Post, p. 349.

¹¹ *Thatcher v. Bank of State of New York*, 5 Sandf. (N. Y.) 121. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 120; *Cent. Dig.* § 293.

¹² *Munn v. Burch*, 25 Ill. 35; *Chicago Marine & Fire Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270; *Elliott v. Capital City State Bank*, 128 Iowa, 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 120, 133; *Cent. Dig.* §§ 293, 339-352.

¹³ See *Marine Bank v. Fulton County Bank*, 2 Wall. 252, 17 L. Ed. 785; *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788; *First Nat. Bank of Decatur v. Henry*, 159 Ala. 367, 49 South. 97; *Alston v. State*, 92 Ala. 124, 9 South. 733, 13 L. R. A. 659; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911; *Butcher v. Butler*, 134 Mo. 61, 114 S. W. 564; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 119, 153; *Cent. Dig.* §§ 289, 483-501.

Same—Power of Incorporated Bank to Receive

The receiving of special deposits is not strictly a banking operation, and the deposit in such case is made with the bank, not because it is a bank, but because it owns a strong vault.¹⁴ This has led some courts to question or deny the power of a banking corporation to receive special deposits where the power is not expressly conferred,¹⁵ and on that ground to hold that national banks do not possess the power.¹⁶ That national banks do possess the power is no longer open to question.¹⁷ And the authorities overwhelmingly support the rule that if a bank be accustomed to take such deposits, and this is known to and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter.¹⁸

¹⁴ Dunbar, *Theory & History of Banking*, 14.

¹⁵ *First Nat. Bank of Manhattan v. Citizens' Bank of Topeka*, Fed. Cas. No. 4,802. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 120, 153; *Cent. Dig.* §§ 293, 483-501.

¹⁶ *Wiley v. First Nat. Bank of Brattleboro*, 47 Vt. 546, 19 Am. Rep. 122; *Whitney v. First Nat. Bank of Brattleboro*, 50 Vt. 389, 28 Am. Rep. 503. See, also, *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181. See "*Banks and Banking*," *Cent. Dig.* § 1007.

¹⁷ The provision of Rev. St. U. S. § 5228 (U. S. Comp. St. 1901, p. 3506), that it shall be lawful for the bank after failure to "deliver special deposits" is a recognition of its power to receive them. *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *First Nat. Bank of Monmouth v. Strang*, 138 Ill. 347, 27 N. E. 903; *First Nat. Bank of Mansfield v. Zent*, 39 Ohio St. 105.

Under Code Iowa, § 1841, providing that savings banks may receive on deposit the savings and funds of others, preserve and invest the same, etc., a savings bank has power to receive a special deposit of securities for safe-keeping. *Sherwood v. Home Sav. Bank*, 131 Iowa, 528, 109 N. W. 9. See "*Banks and Banking*," *Cent. Dig.* § 1007.

¹⁸ *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369; *Foster v. President, etc., of Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Patti-*

Same—Liability of Bank

Usually in the case of a special deposit received by a bank the bailment is gratuitous, and it is therefore laid down that the bank is liable for such loss only as results from its gross negligence.¹⁹ Gross negligence has been defined as absence or want of slight care or diligence, and, applying this standard, some cases have declared that it is sufficient if the bank employs the same care which the most inattentive persons take.²⁰ The better rule is that a bank which receives a special deposit is bound to exercise over it such reasonable care as a reasonably prudent and careful man may fairly be expected to take of his own property of similar description.²¹ "What will constitute such reasonable care will vary with the nature, value, and situation of the property, the general pro-

son v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Scott v. National Bank of Chester Valley, 72 Pa. 471, 13 Am. Rep. 711; First Nat. Bank of Carlisle v. Graham, 79 Pa. 106, 21 Am. Rep. 49.

Where a bank was broken into by burglars, and property of its own and of others taken, it may take measures to recover the property for those jointly concerned; and want of proper diligence, skill, and care in the performance of such an undertaking would render it liable in damages for failure. Wylie v. Northampton Nat. Bank, 119 U. S. 361, 7 Sup. Ct. 268, 30 L. Ed. 455. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 153*; *Cent. Dig. §§ 483-501, 1007-1012*.

¹⁹ See cases cited in preceding note.

²⁰ First Nat. Bank of Allentown v. Rex, 89 Pa. 308, 33 Am. Rep. 767. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 153*; *Cent. Dig. §§ 483-501, 1007-1012*.

²¹ Giblin v. McMullen, 2 L. R. P. C., 317; Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788; First Nat. Bank of Mansfield v. Zent, 39 Ohio St. 105.

A bank is liable if it is negligent in delivering a special deposit to the wrong person. Ganley v. Troy City Nat. Bank, 98 N. Y. 487; Lancaster County Nat. Bank v. Smith, 62 Pa. 47; Manhattan Bank v. Walker, 130 U. S. 267, 9 Sup. Ct. 519, 32 L. Ed. 959; Cf. Walker v. Manhattan Bank (C. C.) 25 Fed. 247. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 153*; *Cent. Dig. §§ 483-501, 1007-1012*.

tection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. * * * Gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands." ²²

The question of the bank's liability has frequently been raised by the theft or embezzlement of a cashier or other officer of the bank. In some cases it has been held that the bank was not liable, upon the ground that the act of the officer was not one committed while acting within the scope of his authority.²³ These cases have been justly criticised so far as they hold that the bank is exempt from liability for the fraudulent act of an employé whose employment embraces a supervision of its property.²⁴ Later cases impose upon the bank the duty of taking such measures as will ordinarily secure the property from burglars outside and thieves within, and of employing fit men for the discharge of their duties, and of removing an employé upon notice of his untrustworthiness, and hold the bank liable for a loss that results from failure so to do.²⁵

²² *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 483-501, 1007-1012.

²³ *Foster v. President, etc., of Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Scott v. National Bank of Chester Valley*, 72 Pa. 471, 13 Am. Rep. 711. See, also, *Giblin v. McMullen*, 2 L. R. P. C. 317.

A bank is liable to a special depositor for the loss of his deposit through its diversion by its officers. *El Paso Nat. Bank v. Fuchs* (Tex. Civ. App.) 34 S. W. 203. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 483-501, 1007-1012.

²⁴ See opinion of Field, J., in *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 163, 34 L. Ed. 788, criticising *Foster v. President, etc., of Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, and *Scott v. National Bank of Chester Valley*, 72 Pa. 471, 13 Am. Rep. 711. Cf. *Smith v. First Nat. Bank in Westfield*, 99 Mass. 605, 97 Am. Dec. 59. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 483-501, 1007-1201.

²⁵ In an action against private bankers to recover the value of

A bank may of course render itself responsible in any event by a special contract with the depositor.²⁶

Same—Collateral Security, etc.

Where a deposit is made with a bank, not merely for safe-keeping, but as collateral security for a loan or an overdraft, or for some other purpose in which the bank has a direct interest, the bailment not being gratuitous, a more stringent obligation is said to be imposed. In such case, it is said, the bank must exercise the same care and diligence that a prudent owner would exercise over his own property of a similar kind.²⁷ The same rule applies to paper deposited for collection.²⁸

bonds placed with them as a special deposit, and stolen by an absconding cashier, it appeared that, about a year before his flight, the managing partner became aware that he had been speculating, and, on charging him therewith, was told that he was not doing so then, and would not thereafter; that no efforts were made to verify his statements, or ascertain whether he had used property not his own; that later it was learned that he had been speculating again, but he stated that these were deals for friends, and were closed; that an examination of the books and securities, though not of the special deposits, was then made, but the cashier was retained. Held, that this was gross negligence, and defendants were liable, whether regarded as gratuitous bailees or bailees for hire. *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788. See, also, *Merchants' Nat. Bank of Savannah v. Carhart*, 95 Ga. 394, 22 S. E. 628, 32 L. R. A. 775, 51 Am. St. Rep. 95; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172; *Sherwood v. Home Sav. Bank*, 131 Iowa, 528, 109 N. W. 9. Cf. *Town of Fairfield v. Southport Nat. Bank*, 80 Conn. 92, 67 Atl. 471. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 153*; *Cent. Dig. §§ 483-501, 1007-1012*.

²⁶ *Hale v. Rawallie*, 8 Kan. 136; *Maury v. Coyle*, 34 Md. 235. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 153*; *Cent. Dig. §§ 483-501, 1007-1012*.

²⁷ *Preston v. Prather* 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed.

²⁸ *First Nat. Bank of Birmingham v. First Nat. Bank of Newport*, 116 Ala. 520, 22 South. 976. See "*Banks and Banking*," *Dec. Dig. (Key No.) §§ 153, 156*; *Cent. Dig. §§ 483-501, 539-546*.

Deposit for Specific Purpose

Where a deposit is made with the understanding that the bank is to apply it to a specific purpose, as to pay it to a designated person, or to pay a certain note, or to remit, the transaction is sometimes called a specific deposit,²⁹ but more often misleadingly, a special deposit.³⁰

It is, of course, the duty of the bank to obey the instructions of the depositor, which indicate the purpose to which the deposit is to be applied.³¹ If a deposit of money be upon such terms that the bank is not permitted to mingle it with its own funds, it is clear that it is not an asset of the bank, but that a trust relation is established, and that, if the bank mingles the money with its own funds, the depositor or the benefi-

788; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172; *Third Nat. Bank of Baltimore v. Boyd*, 44 Md. 47, 22 Am. Rep. 35; *Ouderkirk v. Central Nat. Bank of Troy*, 119 N. Y. 263, 23 N. E. 875. See, also, *Jenkins v. National Village Bank of Bowdoinham*, 58 Me. 275; *Dearborn v. Union Nat. Bank of Brunswick*, 61 Me. 369. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 179; *Cent. Dig.* § 683.

²⁹ The power to receive specific deposits is incidental to the ordinary banking business. *Kansas Nat. Bank v. Quinton*, 57 Kan. 750, 48 Pac. 20; *American Nat. Bank of Arkansas City v. Pressnall*, 58 Kan. 69, 48 Pac. 556. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 120; *Cent. Dig.* §§ 293-302.

³⁰ See *Brahm v. Adkins*, 77 Ill. 263; *National Bank of Fishkill v. Speight*, 47 N. Y. 668; *Parker v. Hartley*, 91 Pa. 465; *Fort v. First Nat. Bank of Bateburg*, 82 S. C. 427, 64 S. E. 405. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 483-501, 1007-1012.

³¹ See *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646, 10 N. E. 360; *American Exch. Nat. Bank v. Loretta Gold & Silver Mining Co.*, 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; *Parker v. Hartley*, 91 Pa. 465; *Bank of British North America v. Cooper*, 137 U. S. 473, 11 Sup. Ct. 160, 34 L. Ed. 759.

The bank does not have a lien or right of set-off as with a general deposit. *Wagner v. Citizens' Bank & T. Co.*, 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869. Post, p. 61. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 483-501, 1007-1012.

ciary under the agreement may follow the trust fund and reclaim it, provided it can be identified. On the other hand, if the deposit be upon such terms that it may be mingled with the bank's funds, the identity of the deposit is lost, and, notwithstanding that it is to be applied according to an agreement, and is not to be drawn upon by the depositor, like a general deposit, it seems that a strict trust is not established, since there is no definite res, but that the rights of the depositor and the beneficiary are merely contractual.³² Where, for example, money is deposited for the purpose of paying the indebtedness of a third person, if no contrary instructions are given, it is customary to mingle the money with the funds of the bank, and upon principle it seems that the bank is to be regarded as the debtor of the depositor.³³ In this view, neither the depositor nor the beneficiary under the agreement are entitled to any preference over other creditors if the bank fails to apply the funds according to the agreement.³⁴

³² See *Butcher v. Butler*, 134 Mo. App. 61, 114 S. W. 564. See the illuminating notes, explaining the nature of the relation created by a deposit for a specific purpose, in 12 Harv. Law Rev. 221, and 16 Harv. Law Rev. 228, which have been followed in the text. Money deposited with a banker to secure him from liability on a bond, and mingled with the other funds of the bank with the knowledge of the depositor, passes to the banker's assignee, under a general assignment. *Mutual Accident Ass'n of the Northwest v. Jacobs*, 141 Ill. 261, 31 N. E. 415, 16 L. R. A. 516, 33 Am. St. Rep. 302. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 483-501, 1007-1012.

³³ *Morse, Banks & B.* (4th Ed.) § 210.

³⁴ In *re Barned's Banking Co.*, 39 L. J. Ch. 635 (distinguishing *Farley v. Turner*, 26 L. J. Ch. 710); In *re Hosie*, 7 N. B. R. 601, Fed. Cas. No. 6,711.

Where a corporation agreed to keep on deposit a sum sufficient to protect certain shares of its stock deposited as collateral to secure loans made to its stockholders, there being no evidence that the deposit was special, or that the bank was not to use it as its other funds, the deposit was not a trust, entitling the depositor to a preference. *State Bldg. & Sav. Ass'n v. Mechanics' Savings Bank & Trust Co.* (Tenn. Ch.) 36 S. W. 967. See "*Banks*

The fact, however, that the relation is more than that of debtor and creditor, in that the bank undertakes the duty of applying the deposit, has led, or misled, the courts generally into holding that a trust relation is established, whereby the bank holds the deposit or fund as trustee, and that upon the bank's insolvency, provided the deposit can be traced into assets which have come into the hands of a receiver or assignee, the depositor or the beneficiary, as the case may be, is entitled to a preference over the general creditors.³⁵

and Banking," Dec. Dig. (Key No.) § 153; Cent. Dig. §§ 483-501, 1007-1012.

³⁵ *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385; *Shopt v. Indiana Nat. Bank*, 41 Ind. App. 474, 83 N. E. 515; *Whitcomb v. Carpenter*, 134 Iowa, 227, 111 N. W. 825, 10 L. R. A. (N. S.) 928; *Peak v. Ellicott, Assignee*, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; *People v. City Bank of Rochester*, 96 N. Y. 32; *Farmers' & Mechanics' Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Massey v. Fisher* (C. C.) 62 Fed. 958; *Moreland v. Brown*, 86 Fed. 257, 30 C. C. A. 23. A tenant deposited money to be held by the bank as security to the landlord for performance of his lease, the bank to pay to the landlord such portion thereof as would satisfy any damages he might sustain by the tenant's default, and after a certain time to hold the same to the credit of the landlord and to pay to him in monthly installments. Held, that the deposit created a trust fund, and that the landlord could follow and recover it from the bank's receiver in preference to the general creditors. *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385.

In *Farley v. Turner*, 26 L. J. Ch. 710, a country bank received from a customer money with instructions to pay a certain bill accepted by him and payable at R. & Co.'s in London. The bank caused money to be paid to R. & Co. to meet the bill, who accepted the money for that purpose, but, upon hearing that the country bank had stopped payment, failed to pay the bill. It was held that, the money having been placed with the country bank to be applied to a particular purpose, the money paid to R. & Co. belonged specifically to the customer and not to the general creditors of the country bank.

In *Montagu v. Pacific Bank* (C. C.) 81 Fed. 602, upon somewhat similar facts, a similar result was reached; *Farley v. Turner* be-

Character of Deposits—How Determined

Whether a deposit is general or special, as well as whether it is specific, is to be determined by the agreement of the parties, express or implied. The nature of the deposit may, of course, show that it is special, as plate, or securities, or money in a box or sealed package.³⁶ It will be inferred that a deposit of money is general, in the absence of evidence that it is intended to be special or specific.³⁷ In the case of paper,

ing approved. See comment on this case in 11 Harv. Law Rev. 202.

In *re Barned's Banking Co.*, 39 L. J. Ch. 635, money was paid into a bank for a special purpose, and the bank stopped payment before so applying it. The court distinguished *Farley v. Turner* on the ground that there the country bank had applied the money, and the town agent had received it for that purpose, while here there was no application of the money, so that the payer had no lien, but merely a right to prove with the general creditors of the bank. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 80, 153; *Cent. Dig.* §§ 483-501, 1007-1012.

³⁶ *Dawson v. Real Estate Bank*, 5 Ark. 283; *Foster v. President, etc., of Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168.

A depositor who receives a certificate of deposit, and who draws part and requests the bank to put the balance away in a separate package, is not entitled, on the bank's insolvency, to a preference, though the bank promised to do so, but did not. *Bayor v. American Trust & Savings Bank*, 157 Ill. 62, 41 N. E. 623. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 483-485.

³⁷ *Alston v. State*, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659; *Schofield Mfg. Co. v. Cochran*, 119 Ga. 901, 47 S. E. 208; *Ward v. Johnson*, 95 Ill. 215; *Mutual Acc. Ass'n of the Northwest v. Jacobs*, 141 Ill. 261, 31 N. E. 414, 16 L. R. A. 516, 33 Am. St. Rep. 302; *State v. Dickerson*, 71 Kan. 769, 81 Pac. 497; *Butcher v. Butcher*, 134 Mo. 61, 114 S. W. 564; *Nichols v. State*, 46 Neb. 715, 65 N. W. 774; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; *Myers v. Twelfth Ward Bank*, 28 Misc. Rep. 188, 58 N. Y. Supp. 1065; *Lennan v. Pollock State Bank*, 21 S. D. 511, 110 N. W. 834; *State Bldg. & Sav. Ass'n v. Mechanics' Savings Bank & Trust Co. (Tenn. Ch.)* 36 S. W. 967; *Dearborn v. Washington Sav. Bank* 13 Wash. 345, 42 Pac. 1107. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 483-485.

the nature of the deposit may be indicated by its being credited as paper or as cash.³⁸

RECEIPT AND ENTRY OF GENERAL DEPOSITS

7. **BY WHOM RECEIVED**—In order that a deposit shall bind the bank, it must be made with an officer authorized to receive it.
8. **ENTRY IN PASS BOOK**—An entry made by the bank in the pass book of a depositor, crediting him with the amount of a deposit, is in the nature of a receipt, and may be varied by oral evidence.

Mode of Depositing—With Whom

A deposit must be made with an officer of the bank who is authorized to receive it, in order to render the bank liable thereon.³⁹ The receiving teller, where there is such an officer, is ordinarily the proper person to whom to deliver money for general deposit. Delivery to the receiving teller,⁴⁰ or to the cashier,⁴¹ or to the president,⁴² is sufficient. If delivery is made to some other officer, in order to charge the bank it must be shown that he had authority, either express or implied, as by the usage of the bank, or from the circumstances surrounding the transaction, to receive it.⁴³ Of course, if the

³⁸ Post, p. 34.

³⁹ *Bickley v. Commercial Bank*, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721; *Jumper v. Commercial Bank*, 39 S. C. 296, 17 S. E. 980. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* §§ 293-302.

⁴⁰ Post, p. 327.

⁴¹ Post, p. 321.

⁴² *Hazleton v. Union Bank of Columbus*, 32 Wis. 34. But see, *Bickley v. Commercial Bank*, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721; post, p. 315. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* §§ 293-301.

⁴³ *Terrell v. Branch Bank at Mobile*, 12 Ala. 502; *President, etc., of Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377, 4 Am. Dec. 280; *Thatcher v. Bank of State of New York*, 5 Sandf. (N. Y.) 121;

money actually reaches the proper officer and is credited to the depositor, the bank is liable.⁴⁴ The deposit must be made at the bank;⁴⁵ but a deposit elsewhere is good, if the bank receives it or ratifies it.⁴⁶

Entry in Pass Book

It is usual for the customer of a bank to have a bank book or pass book, and to present it when making a general deposit, for the purpose of having the amount and date of the deposit entered by the receiving teller or other officer receiving it. Such entry in the usual form, crediting the depositor, does not constitute a written contract between the parties, but is merely prima facie evidence, in the nature of a receipt for

Sterling v. Marietta & S. Trading Co., 11 Serg. & R. (Pa.) 179. See *Hotchkiss v. Artisans' Bank*, 41 N. Y. 564. See, also, *Kelley v. Chenango Valley Savings Bank*, 22 App. Div. 202, 47 N. Y. Supp. 1041.

Where a customer, who had overdrawn his account, received a request from the paying teller to call, and at his request paid him over the counter the amount in excess of the overdraft, it not appearing that the receiving teller was present, and it appearing that in his absence the other officers acted in his place, it was held payment to the bank. The court said: "When one * * * finds behind the counter one of its officers employed in its business, and upon his demand pays a debt due the bank in good faith, without any knowledge that the officer's authority is so limited that he has no right to receive it, he must be protected, and the bank must be bound by the payment." *East River Nat. Bank v. Gove*, 57 N. Y. 597. See, also, *Second Nat. Bank v. Averell*, 2 App. D. C. 470, 25 L. R. A. 761. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* §§ 293-302.

⁴⁴ *Dougherty v. Vanderpool*, 35 Miss. 165; *Thatcher v. Bank of State of New York*, 5 Sandf. (N. Y.) 121. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* §§ 293-302.

⁴⁵ *Demarest v. Holdeman*, 34 Ind. App. 685, 73 N. E. 714; *Morse, Banks & B.* (4th Ed.) § 168. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* §§ 293-302.

⁴⁶ *Jumper v. Commercial Bank of Columbia*, 48 S. C. 430, 26 S. E. 725. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* §§ 293-302.

a deposit, and may be explained or contradicted by oral testimony.⁴⁷ Of course, a pass book is not negotiable.⁴⁸ It is usual for the depositor to write the items of his deposit, with

⁴⁷ *Bank of Lawrenceville v. Rockmore & Co.*, 129 Ga. 582, 59 S. E. 291; *Talcott v. First Nat. Bank*, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737; *Follansbee v. Parker*, 70 Ill. 11; *French v. Eastern Trust & Banking Co.*, 91 Me. 485, 40 Atl. 327; *President, etc., of Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; *Davis v. Lenawee Co. Sav. Bank*, 53 Mich. 163, 18 N. W. 629; *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545; *Quattrochi v. Farmers' & Merchants' Bank*, 89 Mo. App. 500; *Mechanics' & Farmers' Bank v. Smith*, 19 Johns. (N. Y.) 115; *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Greenhalgh Co. v. Farmers' Nat. Bank*, 226 Pa. 184, 75 Atl. 260, 134 Am. St. Rep. 1016.

It has been held that, if the deposit be entered when made, the entry is original and binding on the bank; but if the entry be afterwards made by copying from the books of the bank, it could be questioned. *President, etc., of Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377, 4 Am. Dec. 280. See, also, *Hepburn v. Citizens' Bank of Louisiana*, 2 La. Ann. 1007, 46 Am. Dec. 564; *Mechanics' & Traders' Bank v. Banks*, 11 La. 261.

Though a deposit be not entered in the books of the bank till five days after its entry in the pass book, the deposit must be held to have been made at the date of the entry in the pass book. *Wasson v. Lamb*, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342.

A depositor, failing to examine his pass book, is not thereby estopped to claim that the amount entered was too small, unless the bank was prejudiced by the neglect. *Kemble v. Nat. Bank of Rondout*, 94 App. Div. 544, 88 N. Y. Supp. 246, affirmed 183 N. Y. 545, 76 N. E. 1098.

But where a debtor, D., applied for credit to a bank for the amount of the debt, promising to deposit in a few days, and the credit was given, and D. took a deposit slip and pass book in the name of A., his creditor, and delivered them to him in payment of the debt, the transaction was a loan by the bank to D., and a deposit of the amount by A., and D.'s failure to deposit could not affect A.'s rights. *Andrews v. State Bank of Wheatland*, 9 N. D. 325, 83 N. W. 235. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* § 300.

⁴⁸ *Witte v. Vincenot*, 43 Cal. 325; *Stewart v. State*, 42 Tex. 242. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 151; *Cent. Dig.* § 383

his own name as depositor, upon a deposit slip, and to hand it in with the pass book, in which the total amount of the deposit is entered by the teller; ⁴⁹ the book being returned, but the deposit slip being retained by the bank, to guide it in making the proper entries in its own books. Sometimes, for convenience, as where the depositor has failed to bring his pass book to the bank, a duplicate deposit slip, in the nature of a receipt for the deposit, is delivered to the depositor. Such a deposit slip is the equivalent of an entry of the deposit in the book, and is *prima facie* evidence of the deposit.⁵⁰

⁴⁹ Where plaintiff, having checks to deposit, handed them in with his pass book and a deposit slip, erroneously headed with the name of another customer, and the teller entered the amount in the pass book and returned it, and later from the deposit slip the amount was entered in the ledger to the credit of the other customer, it was held that, the pass book not constituting the account and being open to explanation, and the effect of handing in the slip being a direction to credit the other customer, so that the relation of debtor and creditor was not created between plaintiff and the bank as to such deposit, and the first act of negligence, leading to the error, if negligence be considered, having been that of plaintiff, he could not recover of the bank on account thereof. *Schwartz v. State Bank*, 135 App. Div. 42, 119 N. Y. Supp. 763. Cf. *Jackson Ins. Co. v. Cross*, 9 Heisk. (Tenn.) 283. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* §§ 293-302.

⁵⁰ *Weisinger v. Bank of Gallatin*, 10 Lea (Tenn.) 330; *First Nat. Bank of Union Mills v. Clark*, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580 (holding that the delivery by the depositor to a third person of a deposit slip in which a bank acknowledged receipt of a deposit did not operate as an assignment of the deposit).

A deposit slip or receipt issued by the cashier upon a specific deposit is *prima facie* evidence of the liability of the bank. *American Nat. Bank of Arkansas City v. Presnall*, 58 Kan. 69, 48 Pac. 556. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 121; *Cent. Dig.* §§ 293-302.

DEPOSIT OF PAPER

9. **DEPOSIT FOR COLLECTION**—Where checks, bills, notes, or other negotiable instruments are deposited with a bank for collection, the ownership of the paper is not transferred; but the bank holds it as agent or trustee of the depositor until collection, and upon collection, unless it be otherwise agreed, by the weight of authority becomes debtor to the depositor for the amount collected, as upon a general deposit. A deposit is one for collection, if the indorsement of the paper so indicates, and also, if the parties so agree, although the paper be not thus restrictively indorsed, but is indorsed generally, either by a special or a blank indorsement, or, being payable to bearer is transferred by delivery.

10. **SALE OR DEPOSIT FOR COLLECTION**—When a negotiable instrument is indorsed generally, or, being payable to bearer, is delivered to and deposited with a bank, the transaction may be a sale of the paper or a deposit for collection, according to the agreement of the parties. If the paper is credited by the bank to the depositor as cash, the rule prevails generally that, unless a different understanding affirmatively appears, the beneficial ownership of the paper, as well as the legal title, is transferred to the bank, which thereupon becomes a debtor to the depositor for the amount, as upon a general deposit of money, or, in other words, that the transaction is a sale of the paper; but by some courts it is held that, unless it affirmatively appears that the credit is irrevocable by the bank, the transaction is a deposit for collection.

11. CHECK ON DEPOSITORY—Where a check on the depository bank is deposited, the transaction is in effect a presentment of the check for payment, and if the bank unconditionally credits the amount to the depositor, it thereupon becomes a debtor for the amount as upon a general deposit of money.

In General

Where checks, bills, notes, or other negotiable instruments are "deposited," using the term somewhat loosely, with a bank, the transaction may take one of several different forms, according to the circumstances of the case. It may take the form of a deposit for collection, in which case the ownership of the paper is not transferred to the bank, which holds the paper as agent or trustee for the depositor until collection, and does not become a debtor to the depositor until it has made the collection.⁵¹ Or the transaction may take the form of a sale of the paper by the depositor to the bank in exchange for credit given to him by the bank, in which case the paper becomes the absolute property of the bank, which thereupon owes the amount credited to the depositor as upon a general deposit of money.⁵² Or the transaction may be a deposit of a check upon the depository bank, in which case, if it gives the depositor credit for the amount, it thereby in effect pays the check, and becomes a debtor for the amount as upon a general deposit of money.⁵³ The principles which determine the legal effect of these transactions are clear, but the application to particular cases is often difficult, for the reason that the agreement of the parties may not be expressed, and must be inferred from their acts and from other circumstances.

Deposit for Collection

Where paper is deposited for collection, the nature of the transaction may be indicated by the indorsement. An indorsement "for collection" is restrictive, and does not vest the

⁵¹ Post, p. 30.

⁵² Post, p. 33.

⁵³ Post, p. 38.

legal title in the indorsee, but merely constitutes the indorsee the agent of the indorser for the purpose of receiving payment.⁵⁴ A restricted indorsement operates as constructive notice, and subsequent indorseees can acquire no greater rights than those of the indorsee under the restrictive indorsement.⁵⁵

It follows that, if the paper is deposited indorsed "for collection," the bank is the mere agent of the depositor, and the ownership of the paper does not pass to it.⁵⁶ The depositor can terminate the agency at any time and withdraw the paper;⁵⁷ and if the bank becomes bankrupt before collection, the paper does not pass to the assignee or receiver.⁵⁸ The

⁵⁴ *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515; *Sweeney v. Easter*, 1 Wall. 166, 17 L. Ed. 681; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363. So an indorsement "for collection for account of." *Freeman's Nat. Bank v. National Tube-Works Co.*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461. Or "for account." *White v. Miners' Nat. Bank*, 102 U. S. 658, 26 L. Ed. 250. In *Old Nat. Bank v. German-American Nat. Bank*, 155 U. S. 556, 15 Sup. Ct. 221, 39 L. Ed. 259, *Brewer, J.*, inaccurately says that a collecting bank under such indorsement acquired "the mere legal title," never becoming its equitable owner, but such a restrictive indorsement transfers neither legal title nor beneficial ownership. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553; "*Bills and Notes*," *Dec. Dig. (Key No.)* § 292; *Cent. Dig.* §§ 660, 661.

⁵⁵ *Freeman's Nat. Bank v. National Tube-Works Co.*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5. See *Negotiable Instruments Law*, §§ 36, 37. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553; "*Bills and Notes*," *Dec. Dig. (Key No.)* § 292; *Cent. Dig.* §§ 660, 661.

⁵⁶ See cases cited in note 54, *supra*.

⁵⁷ *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 158; *Cent. Dig.* § 543.

⁵⁸ *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 158, 159; *Cent. Dig.* § 544.

mere fact that upon making the deposit the depositor is credited with the amount on his account does not alter the relation of the parties.⁵⁹ The bank has the right to charge the credit back at any time;⁶⁰ and if the depositor actually draws upon the credit, the bank may hold the paper as collateral security for the advance, but not as owner.⁶¹ The relation of the parties changes, however, when the paper is collected. One who collects commercial paper through the agency of a bank must be held impliedly to contract that the business may be done according to the well-known usages of banks, so far as to permit the money collected to be mingled with the funds of the bank.⁶² When payment is made, therefore, the depositor has no right to the specific moneys collected, but, by the great weight of authority, the bank simply becomes his debtor for the amount as upon the general deposit of so much money; and if the bank afterwards becomes insolvent, the depositor must come in with the other general creditors.⁶³

The same principles govern the relation between the bank and the depositor where it is their understanding that the deposit is for collection, notwithstanding that the paper is not restrictively indorsed, but is indorsed generally, either by a

⁵⁹ *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156-159; *Cent. Dig.* §§ 549-552.

⁶⁰ *In re State Bank*, 56 Minn. 119, 123, 57 N. W. 336, 45 Am. St. Rep. 454; *Balbach v. Frelinghuysen* (C. C.) 15 Fed. 675. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553.

⁶¹ *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362; *Ullman v. Barnard*, 7 Gray (Mass.) 554. See *Morse, Banks & B.* § 576. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553.

⁶² *Freeman's Nat. Bank v. National Tube-Works Co.*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 165; *Cent. Dig.* §§ 573-579.

⁶³ See cases cited note 54, *supra*; *post*, p. 349.

special indorsement to the bank or by a blank indorsement,⁶⁴ or, if payable to bearer, is transferred by delivery. In such case, by the law merchant the legal title to the paper passes to the bank, which consequently can further negotiate the paper, and can transfer a good title free from equities to a bona fide purchaser.⁶⁵ But the bank holds the legal title, not for its own benefit, but for the benefit of the depositor.⁶⁶ It is often said that the bank does not get "title"; but the term "title" is thus loosely used to indicate beneficial ownership. Although the bank may give credit to the depositor,

⁶⁴ *Balbach v. Frelinghuysen* (C. C.) 15 Fed. 675; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553; *In re State Bank*, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454. An indorsement "for deposit" is not restrictive. "Where a customer has a deposit account with a bank, on which he is accustomed to deposit checks payable to himself, which are credited to him on his account, and against which he is authorized to draw, an indorsement 'for deposit' is, in the absence of a different understanding, a request and direction to deposit the sum to the credit of the customer, and passes the absolute title to the check to the bank." *Security Bank of Minnesota v. Northwestern Fuel Co.*, 58 Minn. 141, 59 N. W. 987. See, also, *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Fourth Nat. Bank of Cincinnati v. Mayer*, 89 Ga. 108, 14 S. E. 891. Cf. *Freeman v. Exchange Bank of Macon*, 87 Ga. 45, 13 S. E. 160; *Ditch v. Western Nat. Bank*, 79 Md. 192, 29 Atl. 72, 23 L. R. A. 164, 47 Am. St. Rep. 375. In *Beal v. City of Somerville*, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291, an indorsement "for deposit" is held prima facie to create a bailment. See note 82, post. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 159*; *Cent. Dig. §§ 547-553*.

⁶⁵ *Vickrey v. State Savings Ass'n* (C. C.) 21 Fed. 773; *Doppelt v. National Bank of the Republic*, 175 Ill. 432, 51 N. E. 753; *Ditch v. Western Nat. Bank*, 79 Md. 192, 29 Atl. 72, 23 L. R. A. 164, 47 Am. St. Rep. 375; *Cody v. City Nat. Bank*, 55 Mich. 379, 21 N. W. 373; *Hoffman v. First Nat. Bank of Jersey City*, 46 N. J. Law, 604. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 159*; *Cent. Dig. §§ 547-553*.

⁶⁶ *Seybold v. Grand Forks Nat. Bank*, 5 N. D. 460, 67 N. W. 682. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 159*; *Cent. Dig. §§ 547-553*.

the credit is provisional, and the bank may cancel it.⁶⁷ At any time before the paper is paid, and while it is in the possession of the bank, the depositor can demand its return;⁶⁸ and if the bank has become insolvent, he can demand the paper from the assignee or receiver,⁶⁹ and if the latter collects it, he is liable therefor to the depositor.⁷⁰

Sale or Deposit for Collection

A difficult question may be presented where the paper is indorsed without restriction, and is credited in the depositor's pass book as so much cash. Such a transaction on its face is consistent with, and indeed indicates, a sale of the paper, which, like money so deposited, becomes the absolute property of the bank.⁷¹ If the parties intend a sale, it will, of course, be given that effect.⁷² On the other hand, if the parties intend

⁶⁷ *Midland Nat. Bank of Kansas City v. Brightwell*, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608. See "*Banks and Banking*," Dec. Dig. (Key No.) § 159; Cent. Dig. §§ 547-553.

⁶⁸ *Bank of America v. Waydell*, 187 N. Y. 115, 79 N. E. 857. See "*Banks and Banking*," Dec. Dig. (Key No.) § 159; Cent. Dig. §§ 547-553.

⁶⁹ *In re State Bank*, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454. See "*Banks and Banking*," Dec. Dig. (Key No.) § 159; Cent. Dig. §§ 547-553.

⁷⁰ *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553; *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365; post, p. 209. See "*Banks and Banking*," Dec. Dig. (Key No.) § 166; Cent. Dig. §§ 574-586.

⁷¹ *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. 387. See "*Banks and Banking*," Dec. Dig. (Key No.) § 159; Cent. Dig. §§ 547-553.

⁷² *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365. In the absence of a usage, custom, or agreement of any kind, a deposit of an indorsed check in a bank, for which it gives credit to the depositor as cash in a drawing account, is consistent with a finding of an absolute sale of the paper to the bank, especially where the checks of the depositor were honored by the bank at times several

a deposit for collection, it will be given that effect. The bank may define its position as agent, and not as purchaser, by crediting the paper as such, and not as cash,⁷³ or by general notices, printed on its pass books or deposit slips, or otherwise brought home to the depositor, that it accepts deposits of paper only as agent for collection,⁷⁴ or by an agreement with the depositor as from a course of dealing as to his deposits,⁷⁵ or by a special agreement as to the particular de-

weeks subsequent to the date when the bank knew the check was lost in being forwarded to the drawee for collection, when the depositor's account would not have been enough to meet the checks if the amount of the missing check had been charged back, and where his pass book was afterwards written up without charging back the amount of the check. *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. 387. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553.

⁷³ *Thompson v. Giles*, 2 Barn. & C. 422; *Bailie v. Augusta Savings Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 158, 159; *Cent. Dig.* §§ 542-553.

⁷⁴ *In re State Bank*, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454; *South Park Foundry & Machine Co. v. Chicago Great Western Ry. Co.*, 75 Minn. 186, 77 N. W. 796. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 158, 159; *Cent. Dig.* §§ 542-553.

⁷⁵ *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365 (agreement by course of dealing that, though depositor could draw against credit, the paper should be charged back if not paid). To the same effect: *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885; *Fanset v. Garden City State Bank*, 24 N. D. 248, 123 N. W. 686.

Yet where checks were received under an agreement that they should be credited, and, if not paid, charged back, it was held that title passed to the bank subject to the condition that it might rescind the credit if the checks were not paid, and that its failure before collection did not divest its title. *Brusegaard v. Ueland*, 72 Minn. 283, 75 N. W. 228.

Complainant sent a sight draft to a bank in New York, drawn on a debtor in Boston and payable to the bank's order. In the accompanying deposit ticket, it was named under the head of "Checks," but it was credited on the bank's books as if it were a deposit of

posit.⁷⁶ Or the matter may be regulated by general usages obtaining in the locality, or by statute.⁷⁷

Usually the cases in which a bank is held to have been only an agent for collection have, as a controlling element, evidence of usage or notice or particular agreement. Where these elements are wanting, the courts are not agreed as to the effect to be given to a deposit of negotiable paper indorsed without restriction and credited as money.

By most courts it is held upon such a state of facts that the paper immediately becomes the property of the bank, and it thereupon becomes debtor of the depositor for the amount.⁷⁸

money. It was forwarded for collection, but before it was collected the bank closed its doors. There was no express agreement with the bank that out-of-town paper should be deposited as cash, nor was complainant indebted to the bank. During five years complainant had never drawn against out-of-town paper before it was actually collected; and, although complainant was allowed interest on its daily balance, it appeared that the bank reserved the right to charge exchange and interest for the average time taken in collection on such paper. Held, that the bank did not become owner of the draft. Fuller, C. J., appears to draw a distinction between a bill of exchange and a check. *St. Louis & S. F. Ry. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683.

In *Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482, it was said that the custom of the bank to charge a check up against the depositor's account, when the check was not paid, did not vary the legal effect of the transaction, and was simply a method pursued by the bank of exacting payment from the indorser. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 158, 159; *Cent. Dig.* §§ 542-553.

⁷⁶ *Rapp v. National Security Bank*, 136 Pa. 426, 20 Atl. 508. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 158, 159; *Cent. Dig.* §§ 542-553.

⁷⁷ See *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. 387. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 158, 159; *Cent. Dig.* §§ 542-553.

⁷⁸ *Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482; *American Trust & Savings Bank v. Gueder & Paeschke Mfg. Co.*, 150 Ill. 336, 37 N. E. 227; *Lantermann v. Travous*, 73 Ill. App. 670, affirmed 174 Ill. 459, 51 N. E. 805; *Wasson v. Lamb*, 120

The rule has been stated as follows: "Upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, checks, drafts, or other negotiable paper received and credited as money, the title to the money, drafts, or other paper immediately becomes the property of the bank, which becomes debtor to the depositor for the amount, unless a different understanding affirmatively appears."⁷⁹ If it may be assumed that the credit is absolute, and may not be revoked by the bank, this result clearly follows.⁸⁰

Other courts hold that the practice which has grown up among banks to credit deposits of checks and drafts at once to the account of the depositor and to allow him to draw against them is a mere gratuitous privilege, which is also often extended where the paper is indorsed "for collection," as well as where it is indorsed without restriction, and which the bank may revoke at any time, and consequently that, unless it affirmatively appears that the credit is irrevocable, the beneficial ownership of the paper is not transferred, and the transaction constitutes a deposit for collection.⁸¹ Thus where

Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342; Noble v. Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167; Cody v. City Nat. Bank, 55 Mich. 379, 21 N. W. 373; Security Bank of Minnesota v. Northwestern Fuel Co., 58 Minn. 143, 59 N. W. 987; Hendley v. Globe Refinery Co., 106 Mo. App. 20, 79 S. W. 1163; Metropolitan Nat. Bank of New York v. Loyd, 90 N. Y. 530; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Walton v. Riverside Bank, 29 Misc. Rep. 304, 60 N. Y. Supp. 519; Williams v. Cox, 97 Tenn. 555, 37 S. W. 282; Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 904, 109 Am. St. Rep. 925. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 158, 159; Cent. Dig. §§ 542-553.

⁷⁹ Security Bank of Minnesota v. Northwestern Fuel Co., 58 Minn. 143, 59 N. W. 987. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 158, 159; Cent. Dig. §§ 542-553.

⁸⁰ See note 75, supra.

⁸¹ Balbach v. Frelinghuysen (C. C.) 15 Fed. 675; Beal v. City of Somerville, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291; City of Philadelphia v. Eckels (C. C.) 98 Fed. 485. See, also, St. Louis &

a city treasurer deposited checks in a bank, indorsed by him "for deposit," and they were immediately credited to him in his pass book, but it did not appear that there was any agreement to that effect, or that there had been any agreement during the time he had been a depositor that his checks should be treated as cash, or that he should draw against them before they were collected, and the bank became insolvent before the checks were collected, and their proceeds passed into the hands of a receiver, it was held that no title passed to the bank, except as bailee, and that the city was entitled to the proceeds. "The first impression, coming from the view that the deposit was immediately entered to the credit of the city on its pass book," said the court, "favors the view of the appellant [the receiver]; but a careful consideration will demonstrate that this was a mere matter of convenience, and the entry would have been the same on either theory. * * * On the other hand, the appellant fails to show that the city had an absolute right to check against the deposit as soon as made, irrevocable by notice from the bank; and that such right did not exist must be received by this court as a matter of judicial knowledge, notwithstanding the parties in *Moors v. Goddard*, 147 Mass. 287, 17 N. E. 532, and the complainant in this case, seem to have regarded it necessary to prove the practice

S. F. Ry. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683. But see *Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482. Where one deposits in a bank a check or draft on a third party, it is a bailment, unless the understanding be that he may at once draw against the deposit, or, being indebted to the bank, that the deposit may be applied on such indebtedness. *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704.

"Every man, who pays bills not then due into the hands of his banker, places them there as in the hands of his agent, to obtain payment of them when due. If the banker discounts the bill, or advances money upon the credit of it, that alters the case. He then acquires the entire property in it, or has a lien on it pro tanto for his advance." *Giles v. Perkins*, 9 East, 11, 14. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 158, 159; *Cent. Dig.* §§ 542-553.

of a particular bank with reference to this matter.”⁸² The rule as declared in these cases, that the paper does not become the property of the bank, is not inconsistent with the right which the bank undoubtedly has, if the conditional credit is drawn against by the depositor, to hold the paper until the amount drawn is made good from other sources.⁸³

Checks on Depository Bank

Where the paper deposited is a check on the depository bank, other principles are involved. The transaction is in effect a presentment of the check for payment. If the bank honors the check, it charges the amount to the account of the drawer, and credits the amount to the account of the depositor, and the transaction is then closed. The bank owes to the depositor the amount credited, as upon a general deposit of so much cash.⁸⁴ The legal effect is the same as if the money were first paid and then deposited. The bank may, however, credit the depositor's account conditionally, that is,

⁸² *Beal v. City of Somerville*, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291. The court lays much weight on the fact that the indorsement was “for deposit,” which was held, erroneously, it is submitted (ante, note 64), to import a bailment, with the result that it rested on the bank to support affirmatively a claim that on the deposit it became an owner of the check. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 158, 159, 166; *Cent. Dig.* §§ 542-553, 574-576.

⁸³ *Stapylton v. Cie des Phosphates de France*, 88 Fed. 53, 31 C. C. A. 383; *Balbach v. Frelinghuysen* (C. C.) 15 Fed. 675, 682. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 158, 159; *Cent. Dig.* §§ 542-553.

⁸⁴ *City Nat. Bank of Selma v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *American Exchange Nat. Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171; *Titus v. Mechanics' Nat. Bank at Trenton*, 35 N. J. Law, 588; *Oddie v. National City Bank of New York*, 45 N. Y. 735, 6 Am. Rep. 160; *Consolidated Nat. Bank of New York v. First Nat. Bank of Middletown*, 129 App. Div. 538, 114 N. Y. Supp. 308; *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766. See, also, *Second Nat. Bank of New Albany v. Gibboney*, 43 Ind. App. 492, 87 N. E. 1064. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 124; *Cent. Dig.* § 307.

upon condition that if upon examination the check or the drawer's account be not found good the check shall be charged back to the depositor; and in that case the transaction is not closed until after the expiration of the time within which the bank has reserved the right to charge back the amount credited without exercise of such right.⁸⁵ This right is often reserved by notice printed in the pass book that checks upon the depository will be credited conditionally, and if not found good at close of business will be charged back to the depositors, and the latter notified of the fact. If there is no agreement that the credit is conditional, however, there being no fraud, and the check being genuine, it is generally held the transaction is closed as fully as if the bank had paid over the counter the amount called for by the check, and that the bank cannot charge back the amount because the account of the drawer turns out to be overdrawn.⁸⁶ "A bank has always the means of knowing the state of the account of the drawer; and if it elects to pay the paper it voluntarily takes upon itself the risk of securing itself out of the drawer's account or otherwise."⁸⁷

Depository Bank as Holder in Due Course

It might, perhaps, seem that a bank which has discounted or purchased a negotiable instrument, and has given credit

⁸⁵ *Lumsdon v. Gilman*, 81 Hun, 526, 30 N. Y. Supp. 1124. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 124; *Cent. Dig.* § 307.

⁸⁶ See cases cited in note 84, *supra*. Contra: *National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697 (holding that, if the drawer has no funds, the credit in the pass book may be canceled); *Ocean Park Bank v. Rogers*, 6 Cal. App. 678, 92 Pac. 879. Where the depositor knew that the drawer had no funds, he was guilty of fraud, and the bank could charge it back. *Peterson v. Union Nat. Bank*, 52 Pa. 206, 91 Am. Dec. 146. Cf. *Bryan v. First Nat. Bank of McKees Rocks*, 205 Pa. 7, 54 Atl. 480. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 124; *Cent. Dig.* § 307.

⁸⁷ *Oddie v. National City Bank of New York*, 45 N. Y. 735, 6 Am. Rep. 160; post, p. 149. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 124; *Cent. Dig.* § 307.

for the amount to a depositor, thereby in effect promising to pay out the money on his checks, is, so far as concerns the giving of value, a purchaser for value, or holder in due course. Such, indeed, appears to be the English rule.⁸⁸ In this country, however, it is held that the mere giving of credit to the depositor's account does not make the bank a holder for value,⁸⁹ but that to have that effect the credit must be drawn upon, in which case the bank is a holder for value to that extent;⁹⁰ or else the credit must be absorbed by the depositor's antecedent indebtedness, as where his account is overdrawn when the credit is made, in which case the bank is

⁸⁸ See *Royal Bank v. Tottenham*, [1894] 2 Q. B. 715, 717, 718; *Capital & Counties Bank v. Gordon*, [1903] A. C. 240, 245. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 305, 309; "*Bills and Notes*," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* § 908.

⁸⁹ *Alabama Grocery Co. v. First Nat. Bank of Ensley*, 158 Ala. 143, 48 South. 340, 132 Am. St. Rep. 18; *Union Nat. Bank of Columbus v. Winsor*, 101 Minn. 470, 112 N. W. 999, 118 Am. St. Rep. 641; *Citizens' State Bank v. Cowles*, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765; *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 309, 37 N. W. 420; *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063; *Queen City Savings Bank & Trust Co. v. Reyburn* (C. C.) 163 Fed. 597. It is otherwise where the bank assumes an obligation to another on the faith of the credit. *Montrose Sav. Bank v. Claussen*, 137 Iowa, 73, 114 N. W. 547. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 305, 309; "*Bills and Notes*," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* § 908.

⁹⁰ *City Deposit Bank of Columbus v. Green*, 130 Iowa, 384, 103 N. W. 942; *Dreilling v. First Nat. Bank*, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126; *Shawmut Nat. Bank v. Manson*, 168 Mass. 425, 47 N. E. 196; *Security Bank of Minnesota v. Petruschke*, 101 Minn. 478, 112 N. W. 1000, 118 Am. St. Rep. 644; *Benson v. Keller*, 37 Or. 120, 60 Pac. 918; *Northfield Nat. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451, 12 L. R. A. (N. S.) 82. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 305, 309; "*Bills and Notes*," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* § 908.

a holder for value to that extent.⁹¹ This rule has become fixed in most states by the Negotiable Instruments Law, which provides:⁹² "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed to be a holder in due course only to the extent of the amount theretofore paid by him."

TITLE TO AND DISPOSITION OF GENERAL DEPOSITS

12. IN GENERAL—Where a general deposit is made by a person in his own name, a contract is entered into by the bank with the depositor to pay the amount of the deposit to him or to his order, and he has a right to demand such payment. The depositor may, however, hold such right as trustee or agent for a third person, who consequently will have an equitable right to enforce such payment. In the absence of an adverse claim, the bank must make payment upon demand of the depositor.

13. DEPOSIT BY TRUSTEE—Where a deposit is made by a trustee, the relation of debtor and creditor is created between the bank and the trustee, and the bank must make payment to the trustee, unless it has notice that by such payment it would actually participate in a breach of trust.

⁹¹ *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Wallabout Bank v. Peyton*, 123 App. Div. 727, 108 N. Y. Supp. 42. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 305, 309; "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 354-356; *Cent. Dig.* §§ 904-908.

⁹² Section 54. See *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 193; *Albany County Bank v. People's Co-operative Ice Co.*, 92 App. Div. 47, 86 N. Y. Supp. 773. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 354-356; *Cent. Dig.* §§ 904-908.

EXCEPTION—If the bank knows that a deposit of trust moneys is a breach of trust, it will hold the moneys as a constructive trustee.

14. DEPOSIT BY AGENT—Where a deposit is made by an agent in the name of his principal, the principal alone has a right to demand payment from the bank. If the deposit is made by the agent in his own name, although the bank has notice of the agency, the agent may demand payment, in the absence of an adverse claim by the principal.

15. DEPOSIT IN NAME OF THIRD PERSON—Where a deposit is made in the name of a third person, the bank must make payment to such person, in the absence of an adverse claim by the actual depositor or another. The actual depositor has a right to demand payment from the bank, if the money deposited was his own and he did not intend to transfer the beneficial ownership of the deposit to the person in whose name it was made.

16. ASSIGNMENT, ATTACHMENT, ETC.—The right to a deposit may be assigned by the depositor, and is subject to attachment or garnishment at the suit of his creditor, subject to the rights of those who may be equitably entitled to the deposit.

In General

The primary duty which a bank owes to its depositor is to pay to him the amount standing to his credit upon a proper demand.⁹³ The right of the depositor to receive payment may, however, be held by him as trustee or agent for a third person, who consequently may have an equitable right to demand payment from the bank; and this may be so, although there be nothing on the face of the transaction to indicate that a third person has an interest in the deposit. Again,

⁹³ Post, p. 56.

a person may make a deposit in the name of a third person, and yet himself have a right to receive payment from the bank. Various considerations, therefore, may have to be taken into account in answering the question as to who is entitled to demand payment of a deposit, or, as it is often put, who has the "title to a deposit." It is, of course, not strictly accurate to use the term "title to a deposit" in this sense, since the title to and ownership of moneys deposited is in the bank, which is merely a debtor for the amount, and the question under consideration is: What person has the right to enforce the obligation? If it be borne in mind, however, that by "title to a deposit" nothing more is meant than the right to demand payment, the term is not misleading.

Deposit by Apparent Owner

Where a bank receives a deposit and credits the depositor with the amount, it thereby impliedly enters into a contract with him to pay the money to him or to his order. Unless the bank has notice of an adverse claim to the fund, it becomes its duty, therefore, to make payment upon receiving such an order,⁹⁴ and it is, of course, fully protected in making such payment.⁹⁵ If the bank pays out money without a proper order, the rights of the depositor are not thereby affected.⁹⁶

⁹⁴ Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; First Nat. Bank of Lock Haven v. Mason, 95 Pa. 113, 40 Am. Rep. 632; Citizens' Nat. Bank v. Alexander, 120 Pa. 476, 14 Atl. 402; In re Plankinton Bank, 87 Wis. 378, 58 N. W. 784. See "*Banks and Banking*," Dec. Dig. (Key No.) § 129; Cent. Dig. §§ 312-326.

⁹⁵ Greene v. Bank of Camas Prairie, 7 Idaho, 576, 64 Pac. 888; McEwen v. Davis, 39 Ind. 109; Martin v. Kansas Nat. Bank, 66 Kan. 655, 72 Pac. 218; Fulton Bank v. New York & S. Canal Co., 4 Paige (N. Y.) 127; Woodbridge v. First Nat. Bank, 45 App. Div. 166, 61 N. Y. Supp. 258; Davis v. Panhandle Nat. Bank (Tex. Civ. App.) 29 S. W. 926. See "*Banks and Banking*," Dec. Dig. (Key No.) § 129; Cent. Dig. §§ 312-326.

⁹⁶ Post, p. 160.

Deposit by Trustee

Where a deposit is made by an executor, administrator, public officer, or other trustee, the relation of debtor and creditor is created between the bank and the depositor as in other cases.⁹⁷ The rule is subject to the exception that if the deposit is made in violation of the trust, and this is known to the bank, so that it has no right to receive the deposit, as in the case of a deposit made by a public officer in violation of law, the relation of debtor and creditor is not created, but the bank holds the money as a constructive trustee, with the result that if the bank becomes insolvent the beneficiary has a preferred claim as against the general creditors, if he can trace and identify the fund.⁹⁸

⁹⁷ *Hawkins v. Cleveland, C., C. & St. L. Ry. Co.*, 89 Fed. 266, 32 C. C. A. 198; *McNulta v. West Chicago Park Com'rs*, 99 Fed. 900, 40 C. C. A. 155; *Glynn County v. Brunswick Terminal Co.*, 101 Ga. 244, 28 S. E. 604; *Otis v. Gross*, 96 Ill. 612, 36 Am. Rep. 157; *Fletcher v. Sharpe*, 108 Ind. 276, 9 N. E. 142; *Officer v. Officer*, 120 Iowa, 389, 94 N. W. 947, 98 Am. St. Rep. 365; *State v. Corning State Savings Bank*, 128 Iowa, 597, 105 N. W. 159 (receiver); *Hanson v. Roush*, 139 Iowa, 58, 116 N. W. 1061; *McAfee v. Bland* (Ky.) 11 S. W. 439; *Paul v. Draper*, 158 Mo. 197, 59 S. W. 77, 81 Am. St. Rep. 296; *Henry v. Martin*, 88 Wis. 367, 60 N. W. 263.

So where an officer wrongfully deposits public funds in his own name, where the character of the funds is unknown to the bank. *Long v. Emsley*, 57 Iowa, 11, 10 N. W. 280. See, also, *Rhinehart v. New Madrid Banking Co.*, 99 Mo. App. 381, 73 S. W. 315.

The addition of the word "clerk" to the name of a general depositor did not make a deposit by the clerk of a county court a special one. *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 130; Cent. Dig. §§ 319-327*.

⁹⁸ *State v. Thum*, 6 Idaho, 323, 55 Pac. 858; *Independent Dist. of Boyer v. King*, 80 Iowa, 497, 45 N. W. 908; *Page County v. Rose*, 130 Iowa, 296, 106 N. W. 744, 5 L. R. A. (N. S.) 886; *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 289; *Myers v. Board of Education*, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263; *Board of Fire & Water Com'rs of City of Marquette v. Wilkinson*, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; *State v. Midland State Bank*, 52 Neb. 1, 71 N. W. 1011, 66 Am. St. Rep. 484; *Watts v. Board of Com'rs* (Okla.) 95 Pac. 771; *State v. Foster*, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A.

Unless the case falls within the exception, if a deposit is made by one as trustee, a contract is entered into between the bank and the trustee, and the trustee has the right to withdraw the deposit, and the bank may assume that the trustee will appropriate the money, when drawn, to its proper use.⁹⁹ The bank is under no obligation to look after the appropriation of trust funds when withdrawn or to protect the trust by setting up a *jus tertii* against a demand by the trustee. "A bank account, * * * even when it is a trust fund, and designated as such, differs from other trust funds, which are permanently invested for the sake of being held as such; for a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and, when drawn in proper form, the bank is bound to presume that the trustee is in the course of performing his duty, and to honor them accordingly."¹⁰⁰ If, however, the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, and participates in the misapplication of the fund, it is liable.¹⁰¹ If, for example, a bank knowingly receives in

226, 63 Am. St. Rep. 47; *San Diego County v. California Nat. Bank* (C. C.) 52 Fed. 59; *Merchants' Nat. Bank v. School Dist. No. 8*, 94 Fed. 705, 36 C. C. A. 432; post, p. 354. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

⁹⁹ *Gray v. Johnston*, L. R. 3 H. L. Cas. 14; *Munnerlyn v. Augusta Savings Bank*, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; *State Nat. Bank v. Reilly*, 124 Ill. 464, 14 N. E. 657; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; *Loring v. Brodie*, 134 Mass. 453; *Board of Chosen Freeholders of County of Essex v. Newark City Nat. Bank*, 48 N. J. Eq. 51, 21 Atl. 185. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹⁰⁰ *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹⁰¹ *McNulta v. West Chicago Park Com'rs*, 99 Fed. 900, 40 C. C. A. 155; *Swift v. Williams*, 68 Md. 236, 11 Atl. 835; *Duckett v. National*

satisfaction of a debt from a depositor funds standing to his credit as trustee, it participates in a breach of trust, and must refund to the beneficiary.¹⁰² So, where a check was drawn, "Pay to the order of S., cashier, \$2,000, to deposit to the credit of C., trustee," and the bank credited it to the personal account of C., who drew out the money and embezzled it, it was held that the bank was liable to the beneficiary for the proceeds of the check so deposited, since by crediting the money to the personal account of C. with knowledge that it ought to be deposited to the account of C. as trustee, the bank participated in a breach of trust.¹⁰³ This case probably extends the responsibility of the bank to its farthest limit. Other cases, which are nearly, if not quite, undistinguishable, hold that where a check is payable to one as trustee, and is deposited by him in his personal account, and embezzled, the bank is not by the form of the check, which it might safely cash, put upon inquiry, so as to be liable for the embezzled money.¹⁰⁴ In the absence of a claim by the beneficiary, payment

Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; Bank of Greensboro v. Clapp, 76 N. C. 482. See cases cited in note 99, *supra*. See, also, Parks v. Knickerbocker Trust Co., 137 App. Div. 719, 122 N. Y. Supp. 521; Emerado Farmers' Elevator Co. v. Farmers' Bank of Emerado, 20 N. D. 270, 127 N. W. 523, 29 L. R. A. (N. S.) 567. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹⁰² Gray v. Johnston, L. R. 3 H. L. Cas. 14; American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; Armour-Cudahy Packing Co. v. First Nat. Bank of Greenville, 69 Miss. 700, 11 South. 28; Lund v. Seamen's Bank for Savings, 37 Barb. (N. Y.) 129. Cf. Moore v. Hanscom, 101 Tex. 293, 106 S. W. 876. But see Lee v. Marion Nat. Bank, 94 Ky. 41, 21 S. W. 346. The payment can be avoided only by the cestui. Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹⁰³ Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹⁰⁴ Batchelder v. Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024; Mills v. Nassau Bank, 52 Misc. Rep. 243, 102 N. Y. Supp. 1119; Safe-

by the bank to the executor or administrator of the trustee is valid.¹⁰⁵

Deposit by Agent

It is, of course, elementary law that a bank may not honor checks purporting to be drawn by an agent of the depositor unless the agent has proper authority.¹⁰⁶ And if one person as agent of another opens an account in the name of another, this warrants no implication of authority in the agent to check upon the account, although the pass book shows that the deposit is made by the agent.¹⁰⁷ But where an account is opened by an agent in his own name, although his agency is disclosed, different considerations may prevail.¹⁰⁸ The agree-

Deposit & Trust Co. v. Diamond Nat. Bank, 194 Pa. 334, 44 Atl. 1064; Hood v. Kensington Nat. Bank, 230 Pa. 508, 79 Atl. 714.

Indeed, in Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513, where the bank credited to the personal account of C., who was trustee of an estate, the proceeds of another check deposited therein, issued in payment of a debt due such estate, in these words: "Pay to the order of S., cashier, \$2,000 for deposit to the credit of C., being the balance of purchase money due him as trustee for J."—and C. drew the money from the bank and embezzled it, it was held that the bank was not liable to the estate, on the theory that it knowingly participated in the breach of trust, since it credited the proceeds as directed in the check. See "*Banks and Banking*," Dec. Dig. (Key No.) § 130; Cent. Dig. §§ 319-327.

¹⁰⁵ Eyerman v. Second Nat. Bank, 13 Mo. App. 289; Id., 84 Mo. 408; Scudder v. Trenton Savings-Fund Soc., 58 N. J. Eq. 154, 43 Atl. 3; Boone v. Citizens' Savings Bank of New York City, 84 N. Y. 83, 38 Am. Rep. 498. See "*Banks and Banking*," Dec. Dig. (Key No.) § 130; Cent. Dig. §§ 319-327.

¹⁰⁶ Post, p. 160. See Deri v. Union Bank of Brooklyn, 65 Misc. Rep. 531, 120 N. Y. Supp. 813. See "*Banks and Banking*," Dec. Dig. (Key No.) § 130; Cent. Dig. §§ 319-327.

¹⁰⁷ Second Nat. Bank of New Albany v. Gibboney, 43 Ind. App. 492, 87 N. E. 1064; Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 481, 69 N. E. 215; Bates v. First Nat. Bank of Brockport, 89 N. Y. 286; Brown v. Daugherty (C. C.) 120 Fed. 526. See "*Banks and Banking*," Dec. Dig. (Key No.) § 130; Cent. Dig. §§ 319-327.

¹⁰⁸ Honig v. Pacific Bank, 73 Cal. 464, 15 Pac. 58; Kerr v. People's

ment of the bank is to repay to the person who makes the deposit, or upon checks drawn by him, and the bank may not set up an adverse title to defeat the claims of its own depositor.¹⁰⁹ Although the depositor declares to the bank that he is the agent of another, the bank may assume that in checking out the deposit he is dealing within his authority.¹¹⁰ So if a depositor opens an account "as agent," without disclosing his principal, it seems that, in the absence of an adverse claim, the bank must honor his checks.¹¹¹ It is, indeed, the tendency

Bank, 158 Pa. 305, 27 Atl. 963. See, also, *Walker v. State Trust Co.*, 40 App. Div. 55, 57 N. Y. Supp. 525. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹⁰⁹ See *First Nat. Bank of Lock Haven v. Mason*, 95 Pa. 117, 40 Am. Rep. 632; *Pennsylvania Title & Trust Co. v. Meyer*, 201 Pa. 299, 50 Atl. 998. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹¹⁰ *First Nat. Bank of Sharon v. Valley State Bank*, 60 Kan. 621, 57 Pac. 510; *Interstate Nat. Bank v. Claxton*, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885 (cf. *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811); *Randolph v. Allen*, 73 Fed. 23, 19 C. C. A. 353 (cf. *Harris & Co. v. Chipman*, 156 Fed. 929, 84 C. C. A. 429). But see *Farmers' Loan & Trust Co. v. Fidelity Trust Co.*, 86 Fed. 541, 30 C. C. A. 247.

Where the treasurer of a corporation wrongfully drew checks in proper form on its account, payable to himself personally, and deposited them to his own account in another bank, which collected them, and permitted him to withdraw the deposit, such bank was not liable therefor to the corporation, since the drawee bank, by paying the checks, acknowledged that the treasurer had authority from the corporation to draw them, and hence the fact that they were payable to the treasurer individually did not require the depository bank to make further inquiry. *Havana Cent. R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 92 N. E. 12. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹¹¹ *Munnerlyn v. Augusta Savings Bank*, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; *Cunningham v. Bank of Nampa*, 13 Idaho, 167, 88 Pac. 975, 10 L. R. A. (N. S.) 706, 121 Am. St. Rep. 257; *Eyerman v. Second Nat. Bank*, 13 Mo. App. 289; *Id.* 84 Mo. 408; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; *Silsbee State Bank v. French Market Grocery Co. (Tex.)* 132 S. W.

of the courts to assimilate the case of a deposit by an agent in his own name to a deposit by a trustee, and to hold that, in the absence of notice to the contrary, the bank must assume that in checking upon the account the agent is acting within his authority.¹¹² Accordingly, it was held in a recent case in Pennsylvania that, where F. opened an account in the name of "F., Attorney for B.," F. was the depositor, so that the bank might pay checks so signed by him, having no notice of F.'s intended misappropriation.¹¹³ These cases are to be distinguished from those that hold that the bank may not appropriate the money of the principal or other person equitably entitled to the fund to the individual debt of the depositor.¹¹⁴

Rights of Equitable Owner of Deposit

Although the relation between the bank and its depositor is merely that of debtor and creditor, and the balance due on the account is a debt to the depositor, the question is always open: To whom in equity does it beneficially belong? If the money deposited was that of a third person, and was held by the depositor in a fiduciary capacity, the equitable owner may assert his right to the deposit.¹¹⁵ The contract created by the deposit being between the bank and the depositor, the

465; *Walker v. Manhattan Bank* (C. C.) 25 Fed. 247 (special deposit).

An agent, depositing as "M., Agent," cannot maintain an action for the deposit in his own name after the agency ceases. *Miller v. State Bank of Duluth*, 57 Minn. 319, 59 N. W. 309. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹¹² See cases in preceding note. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹¹³ *Pennsylvania Title & Trust Co. v. Meyer*, 201 Pa. 299, 50 Atl. 998.

If the principal deposits to the credit of the agent, the bank must honor his checks, unless it has positive knowledge that they were drawn in violation of the trust. *Merchants' & Planters' Nat. Bank of Union v. Clifton Mfg. Co.*, 56 S. C. 320, 33 S. E. 750. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹¹⁴ *Post*, p. 67.

¹¹⁵ *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693; *Union Stock-Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; *Robards v. Hamrick*, 39 Ind.

remedy of the person equitably entitled is in equity.¹¹⁶ Thus a principal may maintain a bill in equity against a bank to recover moneys deposited by his factor as the proceeds of goods consigned for sale.¹¹⁷

A bank may not set up an adverse claim to defeat the claim of its depositor;¹¹⁸ but, after receiving notice of an adverse claim, the bank will pay its depositor at its peril.¹¹⁹ In such case the bank may bring a bill of interpleader.¹²⁰ Payment to the equitable owner will, of course, always be a defense.¹²¹

App. 134, 79 N. E. 386; *Wichita Nat. Bank v. Maltby*, 53 Kan. 567, 36 Pac. 1000; *Hemphill v. Yerkes*, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹¹⁶ *Union Stock-Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; *Hawkeye Gold Dredging Co. v. State Bank of Iowa Falls (C. C.)* 157 Fed. 253; *State Bank of Iowa Falls v. Hawkeye Gold Dredging Co.*, 177 Fed. 164, 100 C. C. A. 626; *Board of Chosen Freeholders of County of Essex v. Newark City Nat. Bank*, 48 N. J. Eq. 51, 21 Atl. 185. Cf. *Smith v. Board of Chosen Freeholders of Essex County*, 48 N. J. Eq. 627, 23 Atl. 268. See *Nolting v. National Bank of Virginia*, 99 Va. 54, 37 S. E. 804. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹¹⁷ *Union Stock-Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 319-327.

¹¹⁸ *First Nat. Bank of Lock Haven v. Mason*, 95 Pa. 113, 40 Am. Rep. 632; *Citizens' Nat. Bank v. Alexander*, 120 Pa. 476, 14 Atl. 402; *Townsend v. Webster Five-Cent Savings Bank*, 143 Mass. 147, 9 N. E. 521; *Lund v. Seamen's Bank for Savings*, 37 Barb. (N. Y.) 129; *Martin v. Minnekahta State Bank*, 7 S. D. 263, 64 N. W. 127. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 129; *Cent. Dig.* §§ 312-318.

¹¹⁹ *Drumm-Flato Commission Co. v. Gerlack*, 92 Mo. App. 326; *Peter Adams & Co. v. National Shoe & Leather Co.*, 44 Hun, 629, 9 N. Y. Supp. 75. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 129; *Cent. Dig.* §§ 312-318.

¹²⁰ *Wayne County Sav. Bank v. Airey*, 95 Mich. 520, 55 N. W. 355; *Harris Banking Co. v. Miller*, 190 Mo. 640, 89 S. W. 629, 1 L. R. A.

¹²¹ *Brown v. Kinsley Exch. Bank*, 51 Kan. 359, 32 Pac. 1113. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129, 130; *Cent. Dig.* §§ 312-327.

Deposit in Name of Another Than Depositor

Where one person makes a deposit in the name of another, whose agent he is, the deposit is, of course, that of the principal.¹²² So the person in whose name the deposit is made is entitled to it; if the depositor thereby intended a gift,¹²³ provided, at least, that the donee accepts it.¹²⁴ It does not follow, however, from the mere deposit in the name of a third person, that he is entitled to the deposit.¹²⁵ The bank may, indeed, in the absence of notice that he is not the owner, safely pay him.¹²⁶ But the depositor may show that the money was his own and that he did not intend a gift.¹²⁷ Where, for example, money is deposited in the name of an-

(N. S.) 790 (certificate of deposit); *Weber v. Bank for Savings*, 1 City Ct. R. (N. Y.) 70; *German Exch. Bank v. Commissioners of Excise*, 57 How. Prac. (N. Y.) 187; *Helene v. Corn Exch. Bank*, 96 App. Div. 392, 89 N. Y. Supp. 310; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Foss v. First Nat. Bank (C. C.)* 3 Fed. 185. But see, *First Nat. Bank of Morristown v. Bininger*, 26 N. J. Eq. 345. Cf. *Loan & Savings Bank v. Farmers' & Merchants' Bank*, 74 S. C. 210, 54 S. E. 364, 114 Am. St. Rep. 991. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129, 130; *Cent. Dig.* §§ 312-327.

¹²² Ante, p. 47.

¹²³ *People v. State Bank of Ft. Edward*, 36 Hun (N. Y.) 607. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 130, 131; *Cent. Dig.* §§ 316-318, 333.

¹²⁴ *Savings Bank of Baltimore v. McCarthy*, 89 Md. 194, 42 Atl. 929; *Scott v. Berkshire County Savings Bank*, 140 Mass. 157, 2 N. E. 925; *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545; post, p. 454. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 130, 131; *Cent. Dig.* §§ 316-318, 333.

¹²⁵ *Reynolds v. St. Paul Trust Co.*, 51 Minn. 236, 53 N. W. 457; *Kerr v. People's Bank*, 158 Pa. 305, 27 Atl. 963. See *Republic Life Ins. Co. v. Hudson Trust Co.*, 130 App. Div. 618, 115 N. Y. Supp. 503 (deposit to credit of third person on condition for depositor's benefit). See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 130, 131; *Cent. Dig.* §§ 316-318.

¹²⁶ *Reynolds v. St. Paul Trust Co.*, 51 Minn. 236, 53 N. W. 457. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 130, 131; *Cent. Dig.* §§ 316-318, 333.

¹²⁷ *Davis v. Lenawee County Savings Bank*, 53 Mich. 163, 18 N. W.

other for the purpose of avoiding attachment, the depositor may recover the deposit, on proof that he did not intend to give or transfer the deposit to such third person.¹²⁸

Assignment of Deposit

The right to a deposit, like any other chose in action, may be assigned,¹²⁹ and the assignment need not be in writing.¹³⁰ As to whether an assignment of a chose in action is valid as against third persons, the law differs in different jurisdictions; but before notice the bank is, of course, protected in paying upon the order of the depositor.¹³¹ By the prevailing rule the mere giving of a check by a depositor does not operate as an assignment, in whole or in part, of the debt created by the deposit, although a different rule prevails in some jurisdictions; but, even where the prevailing rule is in force, it is competent for the parties to create such an assignment by a

629; *Kelly v. Beers*, 194 N. Y. 49, 86 N. E. 980, 128 Am. St. Rep. 543. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 130, 131; *Cent. Dig.* §§ 316-318, 333.

¹²⁸ *Broderick v. Waltham Savings Bank*, 109 Mass. 149. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 130, 131; *Cent. Dig.* §§ 316-318, 333.

¹²⁹ *Schollmier v. Schoendelen*, 78 Iowa, 426, 43 N. W. 282, 16 Am. St. Rep. 455; *First Nat. Bank of Atchison v. Wattles*, 8 Kan. App. 136, 54 Pac. 1103 (certificate of deposit); *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285; *Jaffe v. Bowery Bank*, 31 Misc. Rep. 778, 65 N. Y. Supp. 210. See, also, *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 129; *Cent. Dig.* §§ 334, 335.

¹³⁰ *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659 (assignment in trust); *Oppenheimer v. First Nat. Bank*, 20 Mont. 192, 50 Pac. 419. See *Risley v. Phenix Bank of City of New York*, 83 N. Y. 318, 38 Am. Rep. 421.

The delivery by the depositor to a third person of a deposit slip acknowledging receipt of an amount named does not operate as an assignment of the deposit. *First Nat. Bank of Union Mills v. Clark*, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 129; *Cent. Dig.* §§ 334, 335.

¹³¹ *Post*, p. 95.

clear agreement that such shall be the effect of the transaction.¹³²

Garnishment or Attachment of Deposit

The debt of a bank to its depositor may be reached by a creditor of the depositor by garnishment or attachment in the manner provided in the particular jurisdiction.¹³³ If, however, the person in whose name the deposit stands is not the beneficial owner, the beneficial owner of the deposit is entitled to it as against the creditor of the depositor.¹³⁴ Thus a deposit in the name of "A., Agent," cannot be reached by a creditor of A., if the deposit be that of his principal.¹³⁵ Conversely, a creditor of the equitable owner can by proper pro-

¹³² *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855. See, also, *Risley v. Phenix Bank of City of New York*, 83 N. Y. 318, 38 Am. Rep. 421; *First Nat. Bank of Union Mills v. Clark*, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580; post, p. 130. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129, 130; *Cent. Dig.* §§ 334, 335.

¹³³ *Murphree v. City of Mobile*, 108 Ala. 663, 18 South. 740; *Mayer v. Chattahoochee Nat. Bank*, 51 Ga. 325; *Exchange Bank of Eldorado v. Gulick*, 24 Kan. 359 (debt evidenced by certificate of deposit when nonnegotiable); *Farmers' & Mechanics' Nat. Bank v. Ryan*, 64 Pa. 236. See *Gibson v. National Park Bank of New York*, 98 N. Y. 87. See "*Garnishment*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 110, 111; "*Banks and Banking*," *Cent. Dig.* §§ 328-330.

¹³⁴ *Packer v. Crary*, 121 Iowa, 388, 96 N. W. 870; *Morrill v. Raymond*, 28 Kan. 415, 42 Am. Rep. 167; *Farmers' & Mechanics' Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 130, 131; *Cent. Dig.* §§ 316-333; "*Garnishment*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 110, 111.

¹³⁵ *Des Moines Cotton Mill Co. v. Cooper*, 93 Iowa, 654, 61 N. W. 1084; *Ingersoll v. First Nat. Bank*, 10 Minn. 396 (Gil. 315).

The bank may be charged as garnishee, no other person claiming the money. *Protor v. Greene*, 14 R. I. 42; *Silsbee State Bank v. French Market Grocery Co. (Tex.)* 132 S. W. 465. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 130, 131; *Cent. Dig.* §§ 316-333; "*Garnishment*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 110, 111.

cess reach a deposit standing in the name of another.¹³⁶ The attachment or garnishment is a lien upon the amount actually due to the depositor from the time of service upon the bank.¹³⁷ In jurisdictions where a check is not an assignment, no deduction from the fund is to be made by reason of an outstanding check of the depositor,¹³⁸ unless the check has been certified.¹³⁹ In jurisdictions where a check is an assignment, the bank may pay a check drawn before and presented after service upon it.¹⁴⁰ The creditor can take no better title to the fund than the depositor has, and the garnishment or attachment is subject to the state of the account between the

¹³⁶ *Simmons v. Almy*, 100 Mass. 239; *Gibson v. National Park Bank of New York*, 98 N. Y. 87. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129, 130; *Cent. Dig.* §§ 328-330.

¹³⁷ *R. C. Neely Co. v. Bank of Waynesboro*, 7 Ga. App. 390, 66 S. E. 1099; *Johnson v. Brant*, 38 Kan. 754, 17 Pac. 794; *Foster v. Swasey*, 3 Woodb. & M. 364, 9 Fed. Cas. p. 583, No. 4,985. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129, 130; *Cent. Dig.* §§ 328-330.

¹³⁸ *Post*, p. 127.

Where executors, who are invested with discretion to distribute an estate among the testator's children in such manner and at such times as in their judgment will best promote the children's interests, deposit money in a bank to the credit of the estate, and afterwards give an ordinary check to a child in part distribution, the child does not receive title, so as to enable a receiver, appointed in proceedings supplementary to an execution against him, to sue the bank before the check is presented for payment, since the deposit of money merely makes the bank a creditor of the depositor, and the giving of an ordinary check neither operates as an assignment of the fund nor gives the drawee any right of action against the bank. *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129, 130; *Cent. Dig.* §§ 228-230; "*Garnishment*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 110, 111.

¹³⁹ *Post*, p. 131.

¹⁴⁰ *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129-130; *Cent. Dig.* §§ 319-333; "*Garnishment*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 110, 111.

bank and the depositor.¹⁴¹ Payment to the creditor pursuant to a judgment binding upon the depositor discharges the bank from liability to the depositor.¹⁴² A bank is not affected by a garnishment process, unless it accurately names the depositor, and unless the bank be shown to have knowledge of the identity of the depositor and the person named.¹⁴³

Death of Depositor

Upon the death of a depositor, his rights in respect to the deposit, of course, pass by operation of law to his executor or administrator.¹⁴⁴ A balance in bank may be the subject of a bequest, and, although the bank is merely a debtor for the amount, a bequest of the testator's money is usually construed as covering bank deposits.¹⁴⁵ The effect of the death of a

¹⁴¹ *Moors v. Goddard*, 147 Mass. 287, 17 N. E. 532; *Rice v. Third Nat. Bank*, 97 Mich. 414, 56 N. W. 776. See, also, *Washington Brick, Lime & Mfg. Co. v. Traders' Nat. Bank*, 46 Wash. 23, 89 Pac. 157, 123 Am. St. Rep. 912. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 128-130; *Cent. Dig.* §§ 319-333; "*Garnishment*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 110, 111.

¹⁴² *Randall v. Way*, 111 Mass. 506; *Leonard v. New Bedford Five Cents Savings Bank*, 116 Mass. 210; *Woods v. Milford F. C. Sav. Inst.*, 58 N. H. 184. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 128-130; *Cent. Dig.* §§ 319-333; "*Garnishment*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 110, 111.

¹⁴³ *German Nat. Bank of Denver v. National State Bank*, 5 Colo. App. 427, 39 Pac. 71; *Terry v. Sisson*, 125 Mass. 560. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 128-130; *Cent. Dig.* §§ 328-330; "*Garnishment*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 110, 111.

¹⁴⁴ *Schluter v. Bowery Savings Bank*, 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494; *Maas v. German Savings Bank in City of New York*, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689. See cases in note 105, *supra*. See "*Executors and Administrators*," *Dec. Dig. (Key No.)* §§ 43, 519; "*Banks and Banking*," *Cent. Dig.* § 332

¹⁴⁵ *Mann v. Mann*, 14 Johns. (N. Y.) 1, 7 Am. Dec. 416; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Jenkins v. Fowler*, 63 N. H. 244. Cf. *Hancock v. Lyon*, 67 N. H. 216, 29 Atl. 638. See, also, *In re Caldwell's Estate*, 8 Del. Ch. 358, 68 Atl. 525; *Shelby's Ex'rs v. Shelby*, 36 Ky. (6 Dana) 60; *American Bible Soc. v. Pratt*, 9 Allen (Mass.)

depositor upon his outstanding check will be considered later.¹⁴⁶

PAYMENT

17. **IN GENERAL**—It is the implied agreement of a bank to pay in money at its banking house the amount standing to the credit of a general depositor upon his order or demand. The order may be made by a check or other order for payment, including, in some jurisdictions, a note or acceptance payable at the bank, or, if a certificate of deposit has been issued, by the presentment of the certificate.

18. **INTEREST**—In the absence of special agreement, interest upon a deposit is not payable by the bank; but, when demand for payment of a deposit is made and refused, interest by way of damages runs from the time of the demand.

Payment of Deposit—Demand

It is the obligation of a bank to pay its depositor upon demand.¹⁴⁷ "The legal relation of banker and depositor, upon

109; *Boyd v. Satterwhite*, 12 Rich. Eq. (S. C.) 487. Cf. *Gale v. Drake*, 51 N. H. 78; *Adams v. Jones*, 59 N. C. 221; *Wyatt v. Norris*, 66 W. Va. 667, 66 S. E. 1016. See "*Wills*," *Dec. Dig. (Key No.)* § 566; *Cent. Dig.* § 1238½.

¹⁴⁶ Post, p. 153.

¹⁴⁷ *Ward v. Johnson*, 95 Ill. 215; *McBee v. Purcell Nat. Bank*, 1 Ind. T. 288, 37 S. W. 55; *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319, 48 N. E. 19; *Elliott v. Capital City State Bank*, 128 Iowa, 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198; *Girard Bank v. Bank of Penn Township*, 39 Pa. 92, 80 Am. Dec. 507; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123. Where a bank discontinues banking operations, it waives demand. *Arnold v. Hart*, 176 Ill. 442, 52 N. E. 936; ante, p. 14.

If the bank remits by draft at the depositor's request, the risk is his. *Jung v. Second Ward Savings Bank*, 55 Wis. 364, 13 N. W. 235, 42 Am. Rep. 719. Cf. *Cutler v. American Exch. Nat. Bank*, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 133; *Cent. Dig.* §§ 339-352.

a general deposit, is, in most respects, that of debtor and creditor. By the deposit the latter parts with, and the former acquires, the title to the specific money deposited, and the one becomes indebted to the other in the amount of the sum deposited. But, by universal understanding on the part of bankers and depositors, there is a condition attached to the undertaking of the bank. It is not its duty, as it is that of an ordinary debtor, to seek the creditor and pay him wherever found; it does not undertake to pay without respect to place—to pay absolutely and immediately. But its engagement is to pay at its banking house, when payment shall be called for there.”¹⁴⁸ In other words, it is the duty of the bank to pay upon demand.

Demand—How Made

The demand is usually made by the presentment of a check,¹⁴⁹ or, if a certificate of deposit has been issued, by the presentment of the certificate.¹⁵⁰ But, unless a certificate has been issued, no particular form of order or demand is requisite.¹⁵¹ The bank may, of course, pay upon an oral order, if it sees fit;¹⁵² but it seems that by the usage of banks a bank may require a written order.¹⁵³

¹⁴⁸ *Branch v. Dawson*, 33 Minn. 399, 23 N. W. 552, per Gilfillan, C. J. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 133; *Cent. Dig.* §§ 339-352.

¹⁴⁹ *Post*, p. 96.

¹⁵⁰ *Post*, p. 79.

¹⁵¹ *Neff v. Greene County Nat. Bank*, 89 Mo. 581, 1 S. W. 747; *Weedsport Bank v. Park Bank*, *41 N. Y. 561. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 133; *Cent. Dig.* §§ 339-346; “*Bills and Notes*,” *Dec. Dig. (Key No.)* §§ 400-405; *Cent. Dig.* §§ 1066-1071.

¹⁵² *First Nat. Bank of Cambridge, Ill. v. Hall*, 119 Ala. 64, 24 South. 526; *Rice v. Bank of Camas Prairie*, 5 Idaho, 39, 47 Pac. 856; *McEwen v. Davis*, 39 Ind. 109; *Ellis v. First Nat. Bank*, 22 R. I. 565, 48 Atl. 936. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 133; *Cent. Dig.* §§ 339-346; “*Bills and Notes*,” *Dec. Dig. (Key No.)* §§ 400-405; *Cent. Dig.* §§ 1066-1071.

¹⁵³ *McEwen v. Davis*, 39 Ind. 109; *McLean v. Lowe*, 126 Ind. 449, 26 N. E. 398. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 133;

Note or Acceptance Payable at Bank

Whether a promissory note or an acceptance of a bill of exchange, by its terms payable at the bank, is equivalent to an order to the bank to pay the note or bill for the account of the maker or acceptor, is a question on which the authorities conflict. In England it has been held that it has such an effect, and that the bank, having funds, is bound to honor its customers' notes and acceptances made so payable in the same manner as his checks.¹⁵⁴ In some states the English rule has been followed, at least to the extent of holding that such a note confers authority on the bank to apply the maker's deposit to its payment,¹⁵⁵ or even, perhaps, to advance the amount and charge it as a loan to the maker.¹⁵⁶ In other states it has been held that such a note is not equivalent to a check, and confers no authority upon the bank, but that by

Cent. Dig. §§ 339-446; "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 400-405; *Cent. Dig.* §§ 1066-1071.

¹⁵⁴ *Robarts v. Tucker*, 16 Q. B. 560; *Kymer v. Laurie*, 18 L. J. Q. B. 218. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 415, 418.

¹⁵⁵ *Bedford Bank v. Acoam*, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258 (bank may hold note as purchaser and set off against deposit); *Griffin v. Rice*, 1 Hilt. (N. Y.) 184; *Indig v. National City Bank of Brooklyn*, 80 N. Y. 100; *Francis v. People's Nat. Bank*, 1 Ohio N. P. 281. See, also, *Lazier v. Horan*, 55 Iowa, 75, 7 N. W. 457, 39 Am. Rep. 167 (cf. *Bank of Montreal v. Ingerson*, 105 Iowa, 349, 75 N. W. 351); *Stone v. Demarest*, 67 App. Div. 549, 73 N. Y. Supp. 903; *Riverside Bank v. First Nat. Bank*, 74 Fed. 276, 20 C. C. A. 181.

The maker may withdraw the authority before the bank has acted. *Egerton v. Fulton Nat. Bank*, 43 How. Prac. (N. Y.) 216.

A deposit, with direction to apply to a note, does not appropriate it to that purpose, so that the holder can recover from the bank. *Ætna Nat. Bank v. Fourth Nat. Bank of City of New York*, 46 N. Y. 82, 7 Am. Rep. 314. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 415-418.

¹⁵⁶ See *Mandeville v. Union Bank*, 9 Cranch, 9, 3 L. Ed. 639. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 415-418.

making the note payable at the bank the maker simply fixes the place of presentment for convenience in changing indorsers.¹⁵⁷ In states which have enacted the Negotiable Instruments Law this question is set at rest by the provision that "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."¹⁵⁸

Payment in Money

The obligation of the bank is to pay in money; that is, in legal tender. If it credits the account of the depositor with money, it is not relieved of the obligation to pay money because the deposit was made in funds that were not legal tender,¹⁵⁹ or in depreciated bills,¹⁶⁰ or in bills that have subsequently depreciated.¹⁶¹ Conversely, it may pay in a form of

¹⁵⁷ *Wood v. Merchants' Savings, Loan & Trust Co.*, 41 Ill. 267; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669 (citing authorities). See, also, *National Exch. Bank v. National Bank of North America*, 132 Mass. 147; *Elliott v. Worcester Trust Co.*, 189 Mass. 542, 75 N. E. 944; *Citizens' Bank of Steubenville v. Carson*, 32 Mo. 191; *Adams v. Hackensack Improvement Commission*, 44 N. J. Law, 638, 43 Am. Rep. 406. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 415-418.

¹⁵⁸ Negotiable Instruments Law, § 87. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 415-418.

¹⁵⁹ *Corbit v. President, etc., of Bank of Smyrna*, 2 Har. (Del.) 235, 30 Am. Dec. 635. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 133; *Cent. Dig.* §§ 347-350.

¹⁶⁰ *Bank of Kentucky v. Wister*, 2 Pet. 318, 7 L. Ed. 437 (bills of depositary bank passing at 50 per cent. discount). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 133; *Cent. Dig.* §§ 347-350.

¹⁶¹ *Marine Bank of Chicago v. Chandler*, 27 Ill. 525, 81 Am. Dec. 249; *Chicago Marine & Fire Ins. Co. v. Carpenter*, 28 Ill. 360; *Willets v. Paine*, 43 Ill. 432.

But, where Confederate treasury notes were deposited while such notes were bankable funds, the depositor could not recover the amount as deposited in money. *Foster v. Bank of New Orleans*, 21 La. Ann. 338. See, also, *Dabney v. Bank of State*, 3 S. C. 124. See

legal tender that is less valuable than was the money deposited. Thus it was held that a bank might pay in treasury notes made legal tender after the deposit by the Legal Tender Act, although the agent in perpetrating the fraud, but upon the ground that, were worth less than gold.¹⁶²

Interest on Deposits

Interest is not payable upon a deposit in the absence of agreement therefor.¹⁶³ A bank may, however, make itself lia-

"Banks and Banking," Dec. Dig. (Key No.) § 133; Cent. Dig. §§ 347-350.

¹⁶² Thompson v. Riggs, 5 Wall. 663, 18 L. Ed. 704; Gumbel v. Abrams, 20 La. Ann. 568, 96 Am. Dec. 426. See, also, Carpenter v. Northfield Bank, 39 Vt. 46. Cf. Chesapeake Bank v. Swain, 29 Md. 483. See *"Banks and Banking," Dec. Dig. (Key No.) § 133; Cent. Dig. §§ 347-350.*

¹⁶³ Hilburn v. Mercantile Nat. Bank of Pueblo, 39 Colo. 189, 89 Pac. 45; First Nat. Bank of Springfield v. Coleman, 11 Ill. App. 508; Clark's Adm'r v. Farmers' Nat. Bank of Richmond, 124 Ky. 563, 99 S. W. 674; Cohen v. St. Louis Perpetual Ins. Co., 11 Mo. 374; Parsons v. Treadwell, 50 N. H. 356; Ex parte Stockman, 70 S. C. 31, 48 S. E. 736, 106 Am. St. Rep. 741; Parkersburg Nat. Bank v. Als, 5 W. Va. 50.

Where the bank pays a check under a forged indorsement, in an action by the depositor for the amount so charged to his account, he is not entitled to interest from the date of payment. Atlanta Nat. Bank v. Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96. Contra: German Sav. Bank of Davenport v. Citizens' Nat. Bank, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399.

Certain funds of an insolvent, which were claimed by several creditors, one of them a bank, were, by an order of court, which was made by the consent of all the parties in interest, paid to the bank; it agreeing to pay them over to the court's order, if it was finally decided that the bank was not entitled to them. Meantime the bank used the funds as its own. Held, where the funds were afterwards ordered to be paid over, that the bank was liable for interest thereon for the time it held and used them. Kenton Ins. Co. v. First Nat. Bank, 93 Ky. 129, 19 S. W. 185. Cf. Haswell v. Farmers' & Mechanics' Bank, 26 Vt. 100. See *"Banks and Banking," Dec. Dig. (Key No.) § 132; Cent. Dig. § 351.*

ble to pay interest by agreement.¹⁶⁴ It is the implied contract of a bank to pay the amount credited to the depositor upon demand, and after his demand, and refusal by the bank to pay, interest runs upon the deposit by way of damages.¹⁶⁵ If no demand is made, and action to recover the amount of a deposit is brought, interest runs from the commencement of the action.¹⁶⁶ But where the bank suspends payment, so that demand would be futile, interest runs from the date of suspension.¹⁶⁷

BANK'S LIEN OR RIGHT OF SET-OFF

19. IN GENERAL—A bank has a so-called lien upon a general deposit, or a right of set-off, by virtue of which it may apply the deposit to the payment of any matured unsecured debt of the depositor; and in many jurisdictions, upon the insolvency of the

¹⁶⁴ *Boyd's Ex'r v. First Nat. Bank of Williamsburg*, 128 Ky. 468, 108 S. W. 360; *Linn County v. Farmers' & Merchants' Bank*, 175 Mo. 539, 75 S. W. 393; *Pelham v. Adams*, 17 Barb. (N. Y.) 384; *McLoghlin v. National Mohawk Valley Bank*, 139 N. Y. 514, 34 N. E. 1095.

The payment of interest on deposits is sometimes restrained by statute. *Hannum v. Bank of Tennessee*, 41 Tenn. 398. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* § 351.

¹⁶⁵ *Morse v. Rice*, 36 Neb. 212, 54 N. W. 308. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* § 351.

¹⁶⁶ *Bobb v. Savings Bank (Ky.)* 64 S. W. 494; *Watson v. President, etc., of Phoenix Bank*, 8 Metc. (Mass.) 217, 41 Am. Dec. 500; *Morse v. Rice*, 36 Neb. 212, 54 N. W. 308. Cf. *Cooper v. Townsend*, 59 Hun, 624, 13 N. Y. Supp. 760.

Where a depositor is sued upon his note to the bank, and by counterclaim seeks to have a deposit set off, interest runs on the deposit from service of the answer. *Sickles v. Herold*, 149 N. Y. 332, 43 N. E. 852. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* § 351.

¹⁶⁷ *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Ex parte Stockman*, 70 S. C. 31, 48 S. E. 736, 106 Am. St. Rep. 741. Cf. *Patten v. American Nat. Bank of Denver*, 15 Colo. App.

depositor, the bank may exercise this right, even if the debt is not matured.

20. DEPOSIT MADE AND DEBT OWING IN DIFFERENT CAPACITIES—To entitle the bank to exercise its right of lien or set-off, the debt must be due from the depositor in the same capacity in which he is entitled to the deposit. But by the better rule the bank may exercise this right in respect to a deposit, although it equitably belongs to another than the person in whose name it stands, provided the bank is without notice of the adverse equitable ownership.

21. RIGHT OF SURETY TO HAVE DEPOSIT APPLIED—Whether a bank discharges a surety of a debt of a depositor by failing to exercise its right of lien or set-off, and paying the deposit to the depositor, is a question on which the courts are divided.

In General

A bank has a right to appropriate the funds due upon a general deposit to the payment of any debt due to the bank from the depositor.¹⁶⁸ This right is sometimes called a bank-

479, 63 Pac. 424; *Forschirm v. Mechanics' & Traders' Bank*, 137 App. Div. 149, 122 N. Y. Supp. 168. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* § 351.

¹⁶⁸ *Dawson v. Real Estate Bank*, 5 Ark. 283; *Town of Manitou v. First Nat. Bank of Colorado Springs*, 37 Colo. 344, 86 Pac. 75; *McDowell v. President, etc., of Bank of Wilmington & Brandywine*, 1 Har. (Del.) 369; *Home Nat. Bank v. Newton*, 8 Ill. App. 563; *Bedford Bank v. Acoam*, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258; *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319, 48 N. E. 19; *Knapp v. Cowell*, 77 Iowa, 528, 42 N. W. 434; *Citizens' Bank of Garnett v. Bowen*, 21 Kan. 354; *Muench v. Valley Nat. Bank*, 11 Mo. App. 144; *Commercial Bank of Albany v. Hughes*, 17 Wend. (N. Y.) 94; *President, etc., of State Bank v. Armstrong*, 15 N. C. 519; *Schuler v. Laclede Bank (C. C.)* 27 Fed. 425; *Durkee*

er's lien, but the right of the bank is rather a right to set off against the depositor's demand against the bank its own demand against the depositor. "Though the right is called a 'lien,' strictly it is not, when applied to a general deposit, for a person cannot have a lien upon his own property, but only on that of another; and * * * the funds of general deposit in a bank are the property of the bank. Properly speaking, the right * * * is that of set-off, arising from the existence of mutual demands. The practical effect, however, is the same. The cross-demands are satisfied, so far as they are equal, leaving whatever balance may be due on either as the true amount of the indebtedness from one party to the other."¹⁶⁹ The bank may, therefore, retain the deposit until payment of the debt; and it may itself apply the deposit in payment. The consent of the depositor to the application is not essential.¹⁷⁰

The bank may exercise its right of lien or set-off, as against an executor of the depositor,¹⁷¹ against his assignee in in-

v. *National Bank of Florida*, 102 Fed. 845, 42 C. C. A. 674. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

¹⁶⁹ *Bank of Marysville v. Windisch Muhlhauser Brewing Co.*, 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660. See, also, *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227; *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 South. 228. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

¹⁷⁰ *Bank of Marysville v. Windisch Muhlhauser Brewing Co.*, 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

In *Callaham v. Bank of Anderson*, 69 S. C. 374, 48 S. E. 293, it was held by a divided court that where a bank applied a fund on deposit to the depositor's debt, and without notice to him refused to pay his check in favor of a third person, it was liable to the depositor for the resulting damages. In no other case is notice made requisite to the exercise of the bank's right. See 18 Harv. Law Rev. 310. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

¹⁷¹ *Little's Adm'r v. City Nat. Bank*, 115 Ky. 629, 74 S. W. 699, 103 Am. St. Rep. 349. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

solvency,¹⁷² or the receiver of a depositor corporation,¹⁷³ or against a trustee in bankruptcy.¹⁷⁴ The right is superior to that of a creditor of the depositor upon attachment or garnishment of the deposit.¹⁷⁵

The right of the bank, being a right of set-off, can ordi-

¹⁷² *Clark v. Northampton Nat. Bank*, 160 Mass. 26, 35 N. E. 108; *Delahunty v. Central Nat. Bank*, 63 App. Div. 177, 71 N. Y. Supp. 416. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

¹⁷³ *Wheaton v. Daily Telegraph Co.*, 124 Fed. 61, 59 C. C. A. 427. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

¹⁷⁴ Insolvents by depositing in a bank do not thereby make a transfer of property amounting to a preference, which under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) will deprive the bank of its right to set off the amount of such deposit remaining to the depositor's credit on the date of the adjudication in bankruptcy and to prove its claim against the bankrupt's estate for the balance. *New York County Nat. Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380.

An insolvent corporation deposited funds in defendant bank, which held its notes, some payable on demand, and another not due. By checks drawn on the deposit within four months of its bankruptcy it paid the notes, including the one not due, which did not mature till after the bankruptcy. The checks were given intending a preference, and were therefore voidable under the New York stock corporation law (Consol. Laws 1909, p. 59); but, as the bank had not knowledge of the insolvency, the payments were not voidable as a preference under the bankruptcy law. Held, that the trustee in bankruptcy could recover the payments only to the extent of the note which was not due, since as to the demand notes the bank had a lien or right of set-off, which it could exercise as against the bankrupt or its trustee. *Irish v. Citizens' Trust Co. of Utica*, N. Y. (D. C.) 163 Fed. 880. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

¹⁷⁵ *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; *Wunderlich v. Merchants' Nat. Bank*, 109 Minn. 468, 124 N. W. 223, 27 L. R. A. (N. S.) 811, 134 Am. St. Rep. 788. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

narily be exercised only in respect to a debt of the depositor that has matured.¹⁷⁶ Insolvency, however, is a distinct ground of set-off, and if the depositor be insolvent it is generally held that the bank may set off against the deposit a debt, notwithstanding that it is unmatured.¹⁷⁷ But some courts confine the right, even upon insolvency, to matured debts.¹⁷⁸

¹⁷⁶ *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 South. 520; *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655; *Gardner v. First Nat. Bank of Billings*, 10 Mont. 149, 25 Pac. 29, 10 L. R. A. 45 (holding that authority to apply deposits to notes before their maturity ceased at the depositor's death); *Jordan v. National Shoe & Leather Bank of New York*, 74 N. Y. 467, 30 Am. Rep. 319; *Heidelberg v. National Park Bank*, 87 Hun, 117, 33 N. Y. Supp. 794; *Smith v. Eighth Ward Bank*, 31 App. Div. 6, 52 N. Y. Supp. 290; *Appeal of Farmers' & Mechanics' Bank*, 48 Pa. 57; *Bank of Spartanburg v. Mahon*, 78 S. C. 408, 59 S. E. 31; *Irish v. Citizens' Trust Co. of Utica*, N. Y. (D. C.) 163 Fed. 880. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

¹⁷⁷ *Georgia Seed Co. v. Talmadge & Co.*, 96 Ga. 254, 22 S. E. 1001; *Thomas v. Exchange Bank of Angus*, 99 Iowa, 202, 68 N. W. 780, 35 L. R. A. 379; *Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank*, 90 Ky. 225, 13 S. W. 910, 9 L. R. A. 108; *Demon v. President, etc., of Boylston Bank*, 5 Cush. (Mass.) 194; *Stolze v. Bank of Minnesota*, 67 Minn. 172, 69 N. W. 813; *Sweetser v. People's Bank of Minneapolis*, 69 Minn. 196, 71 N. W. 934; *Nashville Trust Co. v. Bank*, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710; *Ford's Adm'r v. Thornton*, 30 Va. 695; *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707.

A bank summoned as garnishee in an action against a depositor may set off against his deposit unmatured notes where he is insolvent. *Wunderlich v. Merchants' Nat. Bank*, 109 Minn. 468, 124 N. W. 223, 27 L. R. A. (N. S.) 811, 134 Am. St. Rep. 788.

Upon the bank's insolvency the deposit may be set off upon an unmatured note. *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059. Post, p. 74. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 136; *Cent. Dig.* §§ 353-374.

¹⁷⁸ *Homer v. National Bank of Commerce*, 140 Mo. 225, 41 S. W. 790; *Kortjohn v. Continental Nat. Bank of St. Louis*, 63 Mo. App. 166; *Ellis v. First Nat. Bank*, 22 R. I. 565, 48 Atl. 936; *Oat-*

It seems that if a bank has a contingent claim, or a claim for unliquidated damages, arising by contract against a bankrupt depositor, the deposit may be retained by the bank until it be ascertained what the principle debt is, if any, and then it can be used as a set-off.¹⁷⁹ The bank may apply a deposit to payment of a demand note,¹⁸⁰ and to an overdraft by the depositor.¹⁸¹

The fact that checks of the depositor are outstanding does not affect the bank's lien or right of set-off.¹⁸² But in Illinois, where a check was held to be an assignment, it has been held that the rights of the holder became fixed upon presentment, and that thereupon his rights were superior to the right of the

man v. Batavian Bank, 77 Wis. 501, 46 N. W. 881, 20 Am. St. Rep. 136. The right given to a bank by a contract with a depositing and borrowing corporation to declare any indebtedness of the corporation due and payable at once in case of its insolvency, and to apply thereon any money, credits, or other property of the corporation then in the hands of the bank, does not create a lien on any such funds or credits, but merely gives the bank an option, which cannot be exercised after a receiver has been appointed for the corporation in insolvency proceedings. Corn Exch. Nat. Bank v. Locher et al., 151 Fed. 764, 81 C. C. A. 388. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 134, 136; Cent. Dig. §§ 353-374.

¹⁷⁹ Ex parte Howard Nat. Bank, Fed. Cas. No. 6,764, 2 Lowell, 487.

An unliquidated claim in favor of the bank, against the person whose account is attached, growing out of his mismanagement while cashier of the bank, cannot be offset against a balance to his credit. Irvine v. Dean, 93 Tenn. 346, 27 S. W. 666. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 134, 136; Cent. Dig. §§ 353-374.

¹⁸⁰ Citizens' Savings Bank v. Vaughan, 115 Mich. 156, 73 N. W. 143; Irish v. Citizens' Trust Co. of Utica, N. Y. (D. C.) 163 Fed. 880. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 134, 136; Cent. Dig. §§ 353-374.

¹⁸¹ Post, p. 84.

¹⁸² Bank of Marysville v. Windisch Muhlhauser Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; post, p. 127. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 134, 136; Cent. Dig. §§ 353-374.

bank thereafter to apply the deposit to a debt of the depositor, although, were a check presented by the depositor himself, the bank might still appropriate the deposit to the debt.¹⁸³ In Iowa, where, also, a check has been held to be an assignment, the holder had no greater right in this regard than the depositor himself.¹⁸⁴

A bank may not apply a deposit to a debt that is secured.¹⁸⁵

Deposit Made and Debt Owning in Different Capacities

To entitle the bank to assert its lien or set-off, the debt must be due from the depositor in the same capacity as that in which he is entitled to the deposit.¹⁸⁶ For example, where a bank deals with a depositor as trustee, and recognizes the deposit as a trust fund, it cannot apply it to the payment of his individual debt.¹⁸⁷ So, if the bank has knowledge or no-

¹⁸³ Niblack v. Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159, 61 Am. St. Rep. 203; Wyman v. Ft. Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259; Bank of Commerce v. Franklin, 90 Ill. App. 91. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 134, 136; Cent. Dig. §§ 353-374.

¹⁸⁴ Thomas v. Exchange Bank of Angus, 99 Iowa, 202, 68 N. W. 780, 35 L. R. A. 379. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 134, 136; Cent. Dig. §§ 353-374.

¹⁸⁵ McKean v. German-American Savings Bank, 118 Cal. 334, 50 Pac. 656; Furber v. Dane, 203 Mass. 108, 89 N. E. 227. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 134, 136; Cent. Dig. §§ 353-374.

¹⁸⁶ Johnson v. Payne & Williams Bank, 56 Mo. App. 257; Baker v. New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150; Hodgin v. People's Nat. Bank, 125 N. C. 503, 34 S. E. 709; Tobey v. Manufacturers' Nat. Bank, 9 R. I. 236; Nolting v. National Bank of Virginia, 99 Va. 54, 37 S. E. 804. See "*Banks and Banking*," Dec. Dig. (Key No.) § 134; Cent. Dig. §§ 353-374.

¹⁸⁷ United States v. National Bank (C. C.) 73 Fed. 379; McDowell v. Bank of Wilmington & Brandywine, 2 Del. Ch. 1; State Bank of St. John v. McCabe, 135 Mich. 479, 98 N. W. 20; Bank of Greensboro v. Clapp, 76 N. C. 482; Wagner v. Citizens' Bank & Trust Co., 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869; Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544. See

tice that the deposit is a trust fund, it cannot thereafter thus apply it.¹⁸⁸ So a specific deposit, received under an agreement that it is to be applied to a particular purpose, cannot be applied to the depositor's debt.¹⁸⁹ So, if a bank which is a creditor of an insolvent estate receives a deposit from the receiver, it cannot apply such deposit on its claim, or plead it as an off set.¹⁹⁰ So a bank which deals with a depositor as agent, and recognizes the deposit as the fund of the principal, cannot apply it to the payment of the agent's personal debt;¹⁹¹

"Banks and Banking," Dec. Dig. (Key No.) § 134; Cent. Dig. §§ 353-374.

¹⁸⁸ *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 41 N. E. 728; *Bundy v. Town of Monticello*, 84 Ind. 119; *Shepard v. Meridian Nat. Bank*, 149 Ind. 532, 48 N. E. 346; *First Nat. Bank v. Greene (Ky.)* 114 S. W. 322; *First Nat. Bank v. Eastern Trust & Banking Co. (Me.)* 79 Atl. 4; *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617, 89 N. W. 618; *Jamison v. Howard Lockwood & Co.*, 26 Misc. Rep. 730, 56 N. Y. Supp. 1085.

Debts of a partner and his firm to a bank cannot in equity be set off by its receiver against trust moneys which the partner, after the debts were contracted, mingled with the firm deposits, without the bank's knowledge, and the whole amount of which remained continuously in the bank till it failed. *Fisher v. Knight*, 61 Fed. 491, 9 C. C. A. 582. See *"Banks and Banking," Dec. Dig. (Key No.) § 134; Cent. Dig. §§ 353-374.*

¹⁸⁹ *Wilson v. Dawson*, 52 Ind. 513; *Smith v. Sanborn State Bank*, 147 Iowa, 640, 126 N. W. 779, 30 L. R. A. (N. S.) 517, 140 Am. St. Rep. 336; *First Nat. Bank v. Brager (Ky.)* 115 S. W. 726; *Judy v. Farmers' & Traders' Bank*, 81 Mo. 404; *Straus v. Tradesman's Nat. Bank of New York*, 122 N. Y. 379, 25 N. E. 372; *Bank of United States v. Macalester*, 9 Pa. 475; *Wagner v. Citizens' Bank & Trust Co.*, 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869. Cf. *Clark v. Northampton Nat. Bank*, 160 Mass. 26, 35 N. E. 108. See *"Banks and Banking," Dec. Dig. (Key No.) § 134; Cent. Dig. §§ 353-374.*

¹⁹⁰ *State v. Corning State Sav. Bank*, 128 Iowa, 597, 105 N. W. 159. See, also, *Lawrence v. Bank of Republic*, 35 N. Y. 320. See *Banking," Dec. Dig. (Key No.) § 134; Cent. Dig. §§ 353-374.*

¹⁹¹ *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U.

nor can it thus apply the deposit if it has notice or knowledge that the deposit is that of the principal.¹⁹²

A different question is presented where the bank applies to the payment of a debt of a depositor a deposit standing in his name, without knowledge or notice that the deposit equitably belongs to another. If money were paid by a debtor to the bank without notice to it that the money was equitably another's, the amount could not be recovered from the bank by the equitable owner. Where the debtor deposits money, or paper which the bank collects and places to the depositor's account, and the bank, without notice of adverse equitable ownership of the deposit, applies it to the payment of the depositor's debt, the situation is substantially the same; and upon this ground it has been properly held that in such case the bank is protected and the equitable owner has no right of recovery against the bank.¹⁹³ Other courts, however, hold

S. 54, 26 L. Ed. 693. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

¹⁹² *Union Stock-Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; *Union Stock-Yards Nat. Bank v. Moore*, 79 Fed. 705, 25 C. C. A. 150; *Armour-Cudahy Packing Co. v. First Nat. Bank of Greenville*, 69 Miss. 700, 11 South. 28; *James Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 App. Div. 1, 67 N. Y. Supp. 397; *Interstate Nat. Bank v. Claxton*, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 354-374.

¹⁹³ *Smith v. Des Moines Nat. Bank*, 107 Iowa, 620, 78 N. W. 238 (cf. *Armstrong v. National Bank*, 53 Iowa, 752, 5 N. W. 742); *Kimmel v. Bean*, 68 Kan. 598, 75 Pac. 1118, 64 L. R. A. 785, 104 Am. St. Rep. 415; *Sparrow v. State Exch. Bank*, 103 Mo. App. 338, 77 S. W. 169 (although the account was in the name of the depositor "as administrator"); *Hutchinson v. President and Directors of Manhattan Co.*, 150 N. Y. 250, 44 N. E. 775; *Meyers v. New York County Nat. Bank*, 36 App. Div. 482, 55 N. Y. Supp. 504. See, also, *Willey v. Crocker-Woolworth Nat. Bank*, 141 Cal. 508, 75 Pac. 106; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16, 24 Pac. 582; *McEwen v. Davis*, 39 Ind. 109; *Allen v. Brown*, 39 Iowa, 330; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366.

Plaintiff deposited a stock certificate with a firm, who unlaw-

that the bank will not be protected, unless it has been misled by the apparent ownership and has thereby been prejudiced.¹⁹⁴

The bank may apply a deposit against a debt of the equitable owner, although the deposit stands in the name of another person.¹⁹⁵

A bank may not apply a deposit to the debt of a firm of which the depositor is a member.¹⁹⁶ Nor can it charge the individual note of a partner to the account of the firm.¹⁹⁷ It

fully used it as collateral security. The money borrowed thereon was in the form of a check, which the firm deposited to its credit in defendant bank. The firm was also indebted to defendant, which was authorized to apply to the payment of the indebtedness any moneys on deposit to the credit of the firm. Held that, as against plaintiff, defendant had the right to apply the moneys collected on the check to the firm's indebtedness, even after the firm had assigned. *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184, 41 N. E. 403. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

¹⁹⁴ *Burtnett v. First Nat. Bank of Corunna*, 38 Mich. 630; *Douglas v. First Nat. Bank of Hastings*, 17 Minn. 35 (Gil. 18); *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906; *Id.*, 49 Neb. 125, 68 N. W. 358; *Davis v. Panhandle Nat. Bank* (Tex. Civ. App.) 29 S. W. 926. See *Shawnee Nat. Bank v. Wooten & Potts*, 24 Okl. 425, 103 Pac. 714. Cf. *Forbes v. First Nat. Bank of Enid*, 21 Okl. 206, 95 Pac. 785. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

¹⁹⁵ *Camden Nat. Bank v. Green*, 45 N. J. Eq. 546, 17 Atl. 689; *Green v. Camden Nat. Bank*, 46 N. J. Eq. 607, 22 Atl. 56. Contra: *Citizens' Nat. Bank v. Alexander*, 120 Pa. 476, 14 Atl. 402. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

¹⁹⁶ *Watts v. Christie*, 11 Beav. 546; *International Bank v. Jones*, 119 Ill. 407, 9 N. E. 885; *Raymond v. Palmer*, 41 La. Ann. 425, 6 South. 692, 17 Am. St. Rep. 398; *Adams v. First Nat. Bank*, 113 N. C. 332, 18 S. E. 513, 23 L. R. A. 111 (cf. *Hodgin v. People's Nat. Bank*, 125 N. C. 503, 34 S. E. 709); *Owsley v. Bank of Cumberland* (Ky.) 66 S. W. 33; *Eyrich v. Capital State Bank*, 67 Miss. 60, 6 South. 615. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

¹⁹⁷ *Coote v. Bank of the United States*, Fed. Cas. No. 3,204, 3 Cranch, C. C. 95. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

has been held that the bank may apply a deposit against the joint debt of the depositor and another.¹⁹⁸

The bank may not, without the depositor's consent, apply a deposit against a note on which the depositor is an indorser, or a surety, or against a debt guaranteed by the depositor.¹⁹⁹ But it may so apply the deposit if the principal debtor is insolvent.²⁰⁰

Right of Surety to Have Deposit Applied

A bank is not required, without a demand by the depositor, to apply a deposit on account of his debt.²⁰¹ Whether one who holds the position of a surety of a debt of the depositor to the bank, as the indorser of a note held by it, has a right to have the deposit applied to payment of the debt, and consequently is discharged if the bank fails to make such application when it holds a sufficient deposit to pay the debt and permits the deposit to be checked out, is a question as to which the authorities are divided. On the one hand, it is said that the right of the bank to apply a deposit to the satisfaction of the depositor's debt is not a lien, or a right in the nature of a lien, but is in the nature of a set-off or application of payments, neither of which, in the absence of agreement or express appropriation, will be required by the law to be so made

¹⁹⁸ *Hayden v. Alton Nat. Bank*, 29 Ill. App. 458. But see, *Dawson v. Real-Estate Bank*, 5 Ark. 283. *Merchants' & Mechanics' Bank of Wheeling v. Evans*, 9 W. Va. 373. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

¹⁹⁹ *Harrison v. Harrison*, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; *O'Grady v. Stotts City Bank*, 106 Mo. App. 366, 80 S. W. 696. See, also, *New Farmers' Bank's Trustee v. Young*, 100 Ky. 683, 39 S. W. 46. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

²⁰⁰ *Ex parte Howard Nat. Bank*, Fed. Cas. No. 6,764, 2 Lowell, 487. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

²⁰¹ *Boothe v. Farmers' & Traders' Nat. Bank*, 53 Or. 576, 98 Pac. 509; *Guernsey v. Marks*, 55 Or. 323, 106 Pac. 334; *Bacon's Adm'r v. Bacon's Trustees*, 94 Va. 686, 27 S. E. 576. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

as to benefit a surety; and it is therefore held that the surety is not discharged by the bank's failure to apply the deposit to the debt.²⁰² On the other hand, it is said, with better reason, that the right of the bank, if not strictly a lien, nevertheless gives the bank the power to retain control of the deposit for the purpose of security, and that therefore, if the bank fails to apply the deposit, the surety is discharged by operation of the rule of suretyship that a creditor who parts with a security for a debt thereby discharges the surety.²⁰³ The bank is, of course, under no duty to apply the deposit in favor of one primarily liable, as the acceptor of a bill,²⁰⁴ or the maker of a note.²⁰⁵

²⁰² *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368. See, also, *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227; *London & S. F. Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; *Camp v. First Nat. Bank of Ocala*, 44 Fla. 407, 33 South. 241, 103 Am. St. Rep. 173; *Voss v. German-American Bank of Chicago*, 83 Ill. 599, 25 Am. Rep. 415; *Second Nat. Bank of Lafayette v. Hill*, 76 Ind. 223, 40 Am. Rep. 239; *Ticonic Bank v. Johnson*, 21 Me. 426; *National Bank of Newburgh v. Smith*, 66 N. Y. 271, 23 Am. Rep. 48; *Webb v. Smith*, 30 Ch. D. 192. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

²⁰³ *Pursifull v. Pineville Banking Co.*, 97 Ky. 154, 30 S. W. 203, 53 Am. St. Rep. 409. See, also, *Bank of Taylorsville v. Hardesty* (Ky.) 91 S. W. 729; *Dawson v. Real-Estate Bank*, 5 Ark. 283; *McDowell v. President, etc., of Bank of Wilmington & Brandywine*, 1 Har. (Del.) 369; *Commercial Nat. Bank v. Henninger*, 105 Pa. 496.

The deposit must be sufficient at the time of maturity of the debt. Subsequent deposits will not raise the duty. *People's Bank of Wilkes-Barre v. Legrand*, 103 Pa. 309, 49 Am. Rep. 126; *First Nat. Bank v. Shreiner*, 110 Pa. 188, 20 Atl. 718; *First Nat. Bank of Lock Haven v. Peltz*, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

²⁰⁴ *Flournoy v. First Nat. Bank*, 79 Ga. 810, 2 S. E. 547; *Citi-*

²⁰⁵ *Mechanics' & Traders' Bank v. Seitz*, 150 Pa. 632, 24 Atl. 356, 30 Am. St. Rep. 853; *Id.*, 155 Pa. 191, 26 Atl. 209. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

SET OFF BY DEPOSITOR

22. A depositor has the right to set off a general deposit against his matured debt to the bank; and upon the insolvency of the bank he may exercise this right, even if the debt is not matured.

A depositor may at any time require the bank to apply a deposit to the payment of his debt;²⁰⁶ and in an action by the bank on his note, or for money otherwise due, he may set off his deposit against the demand.²⁰⁷ This right of set-off is usually exercised when the bank is insolvent, and the depositor is called upon to pay his debt to it, and in such case he is entitled by way of set-off to the full amount of his deposit, and is not compelled to pay his debt, less such dividend as may be payable to the other general creditors. The right may therefore be exercised as against a receiver or other representative of the insolvent or bankrupt bank.²⁰⁸ Such allowance is not a preference forbidden by the national bank

zens' Bank of Steubenville v. Carson, 32 Mo. 191. Cf. *Armstrong v. Warner*, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; *Van Winkle Gin & Machinery Co. v. Citizens' Bank of Buffalo*, 89 Tex. 147, 33 S. W. 862. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

²⁰⁶ *Laubach v. Leibert*, 87 Pa. 55. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 375-379.

²⁰⁷ *Equitable Bank v. Claassen*, 3 Misc. Rep. 148, 23 N. Y. Supp. 310. See, also, *Becker v. Seymour*, 71 Minn. 394, 73 N. W. 1096. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 375-379.

²⁰⁸ *Fisher v. Hanover Nat. Bank*, 64 Fed. 832, 12 C. C. A. 430; *State v. Brobston*, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138; *Bernstein v. Coburn*, 49 Neb. 734, 68 N. W. 1021; *Second Nat. Bank of Cincinnati v. Hemingray*, 34 Ohio St. 381; *Miller v. Receiver of Franklin Bank*, 1 Paige (N. Y.) 444; *Skiles v. Houston*, 110 Pa. 254, 2 Atl. 30 (administrator of insolvent banker); post, p. 423. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 375-379.

acts.²⁰⁹ If the bank is insolvent, the depositor may exercise his right even against a debt that did not mature until after the insolvency.²¹⁰ He may exercise it as against a debt on which he is a surety, as a note on which he is an indorser.²¹¹ A deposit is not available as a set-off, however, if it has been assigned to a debtor for that purpose after the bank's insolvency.²¹²

²⁰⁹ *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Mercer v. Dyer*, 15 Mont. 317, 39 Pac. 314. See "*Banks and Banking*," *Dec. Dig. (Key. No.)* §§ 135, 287; *Cent. Dig.* §§ 375-379, 1122.

²¹⁰ *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Steelman v. Atchley* (Ark.) 135 S. W. 902, 32 L. R. A. (N. S.) 1060; *Yardley v. Clothier* (C. C.) 49 Fed. 337; *McCagg v. Woodman*, 28 Ill. 84; *Colton v. Drovers' Perpetual Building & Loan Ass'n*, 90 Md. 85, 45 Atl. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431; *Thompson v. Union Trust Co.*, 130 Mich. 508, 90 N. W. 294, 97 Am. St. Rep. 494; *Clute v. Warner*, 8 App. Div. 40, 40 N. Y. Supp. 392; *Jack v. Klepser*, 196 Pa. 187, 46 Atl. 479, 79 Am. St. Rep. 699; *Jones v. Piening*, 85 Wis. 264, 55 N. W. 413.

The right of a depositor to set off, without demand, a deposit on open account, or one the certificate of which has not matured, arises, in the absence of fraud, only in case of the declared insolvency of the bank. *Stadler v. First Nat. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582. See "*Banks and Banking*," *Dec. Dig. (Key. No.)* § 135; *Cent. Dig.* §§ 375-379.

²¹¹ *Yardley v. Clothier* (C. C.) 49 Fed. 337; *Kilby v. First Nat. Bank*, 32 Misc. Rep. 370, 66 N. Y. Supp. 579; *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; *Arnold v. Niess*, 1 Walk. (Pa.) 115. But not if the maker is solvent. *New Farmers' Bank's Trustee v. Young*, 100 Ky. 683, 39 S. W. 46; *Borough Bank of Brooklyn v. Mulqueen*, 70 Misc. Rep. 137, 125 N. Y. Supp. 1034. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 375-379.

²¹² *In re Shults* (D. C.) 132 Fed. 573; *Ingwersen v. Buchholz*, 88 Ill. App. 73; *Stone v. Dodge*, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280 (under statute). See *Oyster v. Short*, 177 Pa. 589, 35 Atl. 686. Cf. *Johnston v. Humphrey*, 91 Wis. 76, 64 N. W. 317, 51 Am. St. Rep. 873. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 375-379; "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 154, 159.

CERTIFICATE OF DEPOSIT

23. **DEFINITION AND EFFECT**—A certificate of deposit is a writing issued by a bank or banker, acknowledging the deposit of money and promising to pay the amount thereof to the depositor, or to him or order, or to bearer, as the case may be. Such a writing is in effect a promissory note, and, if payable to order or bearer, is a negotiable instrument. The certificate may be made payable at a future day certain, and if no time of payment be expressed is payable upon demand.
24. **NECESSITY OF DEMAND**—By the weight of authority a certificate of deposit must be presented for payment in order to charge the bank, and until presentment the statute of limitations does not begin to run; but in some states (now including those which have enacted the Negotiable Instruments Law) the rule prevails that such presentment is not necessary, and the statute begins to run upon the issue of the certificate.

In General

Ordinarily a depositor receives from the bank no evidence of his deposit, except the entry of the amount in his pass book.²¹³ In such case the bank undertakes to honor his checks or other orders to the extent of the deposit.²¹⁴ Sometimes, however, when a checking account as to a deposit is not contemplated, the bank issues a certificate of deposit. A deposit so made has the character of a general deposit, in so far as it creates simply the relation of debtor and creditor between the bank and the depositor.²¹⁵

²¹³ Ante, p. 25.

²¹⁴ Ante, p. 14.

²¹⁵ *Woodhouse v. Crandall*, 99 Ill. App. 552, affirmed 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385; *Leaphart v. Commercial Bank of*

A writing which merely acknowledges the deposit of money does not properly fall within the meaning of a certificate of deposit, but is a mere receipt, furnishing evidence between the bank and the depositor.²¹⁶ To be a certificate of deposit, the writing must contain also the bank's promise to pay the amount deposited. Such a certificate is in effect a promissory note,²¹⁷ and, if it be payable to order or to bearer, it is a negotiable instrument.²¹⁸ Certificates of deposit do not or-

Columbia, 45 S. C. 563, 23 S. E. 939, 33 L. R. A. 700, 55 Am. St. Rep. 800. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 119, 152; *Cent. Dig.* §§ 289-292, 465-482.

²¹⁶ *Modern Woodmen of America v. Union Nat. Bank*, 108 Fed. 753, 47 C. C. A. 667 (Sanborn, J., dissenting); *First Nat. Bank of Union Mills v. Clark*, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580. See, also, *Young v. American Bank*, 44 Misc. Rep. 305, 89 N. Y. Supp. 913. Contra: *Long v. Straus*, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 336, 465-482.

²¹⁷ *In re Brown's Estate*, 113 Iowa, 351, 85 N. W. 617.

Where a certificate was payable to the order of a minor or guardian, payment to one supposed to be, but not, such guardian was not a discharge. *McMahon v. German-American Nat. Bank of Little Falls*, 111 Minn. 313, 127 N. W. 7, 29 L. R. A. (N. S.) 67. See "*Banks and Bankings*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482; "*Bills and Notes*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* § 62.

²¹⁸ *First Nat. Bank of Mishawaka v. Stapf*, 165 Ind. 162, 74 N. E. 987, 112 Am. St. Rep. 214; *Fells Point Sav. Inst. of Baltimore v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Cassidy v. First Nat. Bank*, 30 Minn. 86, 14 N. W. 363; *Dickey v. Adler*, 143 Mo. App. 326, 127 S. W. 593; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; *Read v. Marine Bank of Buffalo*, 136 N. Y. 454, 32 N. E. 1083, 32 Am. St. Rep. 758; *In re Baldwin's Estate*, 170 N. Y. 156, 63 N. E. 62, 58 L. R. A. 122; *Hanna v. Manufacturers' Trust Co.*, 104 App. Div. 90, 93 N. Y. Supp. 304; *Miller v. Austen*, 13 How. 218, 14 L. Ed. 119; *Forrest v. Safety Banking & Trust Co. (C. C.)* 174 Fed. 345 (under Negotiable Instruments Law). Cf. *Dollar v. International Banking Corp.*, 10 Cal. App. 83, 101 Pac. 34, affirmed 13 Cal. App. 331, 109 Pac. 499.

A certificate issued by a trust company, payable to the person named

dinarily contain the word "promise"; but the promise to pay is sufficiently expressed by the word "payable." Negotiable certificates of deposit are commonly in substantially the following form: "This certifies that A. B. has deposited in this bank \$1,000, payable to himself, or order, on the return of this certificate properly indorsed." The words "on the return of this certificate properly indorsed" create no such contingency as to payment as affects the negotiability of the instrument, since they simply express, it has been said, what the law implies as to the duty of the holder of a promissory note in common form, in the absence of any such stipulation,²¹⁹ except so far as by implication they call for presentment at a particular place; that is, at the bank. It follows that the indorser of a negotiable certificate incurs the usual liability of an indorser,²²⁰ and that an innocent purchaser takes it free from equities or personal defenses, such as payment by the bank to the original holder, to the same extent as such purchasers of other negotiable instruments.²²¹

or his assigns, on return of the certificate, which is assignable only on the books of the company, is not a negotiable instrument. *Zander v. New York Security & Trust Co.*, 178 N. Y. 208, 70 N. E. 449, 102 Am. St. Rep. 492. See, also, *In re Fearing*, 138 App. Div. 881, 123 N. Y. Supp. 396. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 42, 147, 151; *Cent. Dig.* §§ 62, 363, 380.

²¹⁹ *Hatch v. First Nat. Bank*, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401; *Cassidy v. First Nat. Bank*, 30 Minn. 86, 14 N. W. 363; *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444, 42 Am. St. Rep. 683. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482; "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 147, 151; *Cent. Dig.* §§ 380, 390.

²²⁰ *Cate v. Patterson*, 25 Mich. 191; *Beckwith v. Webber*, 78 Mich. 390, 44 N. W. 330. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²²¹ *Kavanagh v. Bank of America*, 239 Ill. 404, 88 N. E. 171; *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444, 42 Am. St. Rep. 683. See, also, *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; *In re Ellard*, 62 Misc. Rep. 374, 114 N. Y. Supp. 827; *Currey v. Joplin Savings Bank*, 100 Mo. App. 532, 74 S. W. 1036; *McGorray*

Whether a certificate which is payable "in current funds" is negotiable depends, as in the case of other instruments, upon whether these words are to be construed as signifying money—that is, legal tender—or as including other current means of payment. It is forcibly argued that unless these words have the broader meaning they add nothing, and that unless they be disregarded they must be construed as including other means of payment, and upon this construction some courts hold certificates payable in "current funds," or in "currency," as not negotiable;²²² but by the prevailing rule the words are construed to signify money, and the negotiability of the certificates is sustained.²²³

Power of Bank to Issue

The issue of certificates of deposit is an ordinary incident of the business of banking, and is within the power of the bank or banker, unless there be some statute forbidding it.²²⁴

v. Stockton Savings & Loan Soc., 131 Cal. 321, 63 Pac. 479. Contra: Lebanon Bank v. Mangan, 28 Pa. 452. Cf. Shute v. Pacific Nat. Bank, 136 Mass. 487.

A bank is liable on an accommodation certificate to a purchaser thereof for value, though he knew it was accommodation paper. Holland Trust Co. v. Waddell, 75 Hun, 104, 26 N. Y. Supp. 980. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²²² National State Bank of Lafayette v. Ringel, 51 Ind. 393. See Norton, *Bills and Notes* (3d Ed.) p. 105. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 147, 151; *Cent. Dig.* §§ 380, 390.

²²³ Hatch v. First Nat. Bank, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401; Kirkwood v. First Nat. Bank of Hastings, 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444, 42 Am. St. Rep. 683; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773 (currency). See, also, Bull v. First Nat. Bank, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 147, 151, 162; *Cent. Dig.* §§ 380, 390-398.

²²⁴ Abbott v. Jack, 136 Cal. 510, 69 Pac. 257; Bank of Peru v. Farnsworth, 18 Ill. 563. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

Their issue is therefore within the power of a banking corporation authorized to receive deposits and to exercise the usual powers incidental to the business.²²⁵ Banking corporations are sometimes forbidden to put in circulation notes not payable on demand and without interest, and a time certificate of deposit has been held within this prohibition.²²⁶ But under Rev. St. U. S. § 5183 (U. S. Comp. St. 1901, p. 3482), providing that no national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the act—that is, other than bank notes—the issue of certificates of deposits in ordinary form is not forbidden.²²⁷

Necessity for Demand

Certificates of deposit are sometimes by their terms made payable at a future day; but often the time of payment is not expressed, except by the words making them payable on the return of the certificate. If a certificate is payable at a future day certain, it must be presented for payment on the day of the maturity in order to charge an indorser,²²⁸ and it is overdue after that date, so far as concerns the rights of subsequent purchasers, who will take it subject to defenses.²²⁹

Ordinarily presentment is not necessary to charge a per-

²²⁵ *Francois v. Lewis*, 68 Minn. 409, 71 N. W. 621; *Bank of Saginaw v. Title & Trust Co. of Western Pennsylvania* (C. C.) 105 Fed. 491. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²²⁶ *Bank of Orleans v. Merrill*, 2 Hill (N. Y.) 295; *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 333. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²²⁷ *Riddle v. First Nat. Bank* (C. C.) 27 Fed. 503; *Hunt*, Appellant, 141 Mass. 515, 6 N. E. 554; *Logan Nat. Bank of West Liberty, Ohio, v. Williamson*, 2 Ohio Cir. Ct. R. 118. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²²⁸ *Towle v. Starz*, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²²⁹ *First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City*, 34 Neb. 71, 51 N. W. 305, 15 L. R. A. 386, 33 Am. St. Rep. 618; *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484, 58 N.

son primarily liable upon a negotiable instrument. Even if a promissory note be payable on demand, an action accrues against the maker, and the statute of limitations begins to run from the moment of issue. For the reason that a certificate of deposit is a promissory note, some courts hold that upon a demand certificate an action accrues upon its issue, and the statute of limitations then begins to run.²³⁰ Whatever justification there may be for the doctrine that demand is unnecessary upon an ordinary demand note, different considerations apply to a certificate of deposit. It is universally conceded that, upon a deposit where no certificate is issued, the contract of a bank, based on business custom, is to pay upon demand, and action does not lie until demand has been made.²³¹ The holder of a certificate is a depositor, and, like any other depositor, may leave the money in bank for an indefinite period. Moreover, by the certificate as it is usually worded the bank promises to pay upon its return; that is, upon its presentment at the bank.²³² Accordingly, by the weight of authority it is properly held that upon a certificate of deposit in ordinary form presentment must be made to charge the bank,²³³ and until presentment has been made the statute

W. 1016, 24 L. R. A. 444, 42 Am. St. Rep. 683. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²³⁰ *Brummagin v. Tallant*, 29 Cal. 503, 89 Am. Dec. 61; *Mereness v. First Nat. Bank of Charles City*, 112 Iowa, 11, 83 N. W. 711, 51 L. R. A. 410, 84 Am. St. Rep. 318; *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610; *Birch v. Fisher*, 51 Mich. 39, 16 N. W. 220; *Beardsley v. Webber*, 104 Mich. 88, 62 N. W. 173; *Mitchell v. Easton*, 37 Minn. 335, 33 N. W. 910; *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²³¹ *Post*, p. 90.

²³² *Sanbourn v. Smith*, 44 Iowa, 152; *Elliott v. Capital City State Bank*, 128 Iowa, 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²³³ *Auten v. Crahan*, 81 Ill. App. 502; *Elliott v. Capital City State Bank*, 128 Iowa, 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198; *Brown v. McElroy*, 52 Ind. 404; *Cottle v. Marine*

of limitation does not begin to run.²³⁴ In states where the courts have so held and where the Negotiable Instruments Law has been enacted, these rules have been changed for the worse by the provision that "presentment for payment is not necessary in order to charge the person primarily liable on the instrument," without excepting certificates of deposit.²³⁵

If a certificate of deposit is payable upon a day certain, it is overdue, as has been said, so far as concerns the rights of subsequent purchasers, after that day.²³⁶ When a demand certificate is to be considered overdue in this sense depends upon the rule as to the necessity of demand in the particular jurisdiction. If the certificate be regarded as a mere demand note, it becomes overdue after the lapse of a reasonable time after its date, although no demand is made.²³⁷ Where the

Bank of Buffalo, 166 N. Y. 53, 59 N. E. 736; *Young v. American Bank*, 44 Misc. Rep. 308, 89 N. Y. Supp. 915; *Tobin v. McKinney*, 14 S. D. 52, 84 N. W. 228, 91 Am. St. Rep. 688; *Id.*, 15 S. D. 257, 88 N. W. 572, 91 Am. St. Rep. 694; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²³⁴ *Riddle v. First Nat. Bank (C. C.)* 27 Fed. 503; *Hillsinger v. Georgia Railroad Bank*, 108 Ga. 357, 33 S. E. 985, 75 Am. St. Rep. 42; *Fells Point Sav. Inst. of Baltimore v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Sharp v. Citizens' Bank of Stanton*, 70 Neb. 758, 98 N. W. 50; *Bank of Commerce v. Harrison*, 11 N. M. 50, 66 Pac. 460; *Howell v. Adams*, 68 N. Y. 314; *Smiley v. Fry*, 100 N. Y. 262, 3 N. E. 186; *In re Gardner's Estate*, 228 Pa. 282, 77 Atl. 509, 29 L. R. A. (N. S.) 685; *Tobin v. McKinney*, 14 S. D. 52, 84 N. W. 228, 91 Am. St. Rep. 688; *Id.*, 15 S. D. 257, 88 N. W. 572, 91 Am. St. Rep. 694. Cf. *Baker v. Leland*, 9 App. Div. 365, 41 N. Y. Supp. 399. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482.

²³⁵ Negotiable Instruments Law, § 70. See criticism of the late Dean James Barr Ames, in Brannan, *Neg. Inst. Law*, pp. 53, 78, 80; and *Id.* pp. 59, 68, 81, 89, 91, 151, 152.

²³⁶ *Ante*, p. 79.

²³⁷ *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610. See Negotiable Instruments Law, § 71; *post*, p. 134.

A demand certificate falls within a statute requiring promissory

rule prevails that presentment is necessary to charge the bank, however, it follows that a certificate is overdue only after demand.²³⁸

OVERDRAFTS

25. Where a bank permits a customer to draw from it more money than is standing to his credit in his deposit account, the transaction is in effect a loan by the bank to the customer, and the bank may recover him the amount of the overdraft.

An overdraft arises when a customer of a bank draws from it more money than is standing to his credit in his account.²³⁹ Of course, a bank is under no obligation to a customer, in the absence of special agreement, to honor a check which will overdraw his account.²⁴⁰ If it does so, the transaction is in effect a loan.²⁴¹ An agent merely authorized to draw upon his principal's account is not thereby authorized to make overdrafts, and consequently the principal is not liable therefor unless he ratifies the agent's act, or is by reason of special cir-

notes payable on demand to be presented within 60 days as a condition of charging an indorser. *Mitchell v. Easton*, 37 Minn. 335, 33 N. W. 910. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 465-482; "*Bills and Notes*," *Cent. Dig.* §§ 62, 876½.

²³⁸ *National Bank of Ft. Edward v. Washington County Nat. Bank*, 5 Hun (N. Y.) 605. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 150; *Cent. Dig.* §§ 465-482.

²³⁹ *Low v. Taylor*, 41 Mo. App. 517 (under agreement by which a third person was to be liable for overdrafts); *Marine Bank of Buffalo v. Butler Colliery Co.*, 52 Hun, 612, 5 N. Y. Supp. 291; *State v. Jackson*, 21 S. D. 494, 113 N. W. 880. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 150; *Cent. Dig.* §§ 455-464½.

²⁴⁰ *American Exch. Nat. Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171; *Harrington v. First Nat. Bank of Marseilles*, 85 Ill. App. 212. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 150; *Cent. Dig.* §§ 455-464½.

²⁴¹ *Hennessy Bros. & Evans Co. v. Memphis Nat. Bank*, 129 Fed. 557, 64 C. C. A. 125. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 150; *Cent. Dig.* §§ 455-464½.

cumstances estopped to deny his authority;²⁴² but if the principal allows his agent habitually to overdraw his account, honoring the overdrafts, the bank may assume that such acts are authorized.²⁴³

A bank may maintain an action to recover the amount of an overdraft from the drawer.²⁴⁴ In the absence of agreement,²⁴⁵ the bank may not recover interest upon an overdraft;²⁴⁶ but after demand for payment interest runs by way

²⁴² Merchants' Nat. Bank of Peoria v. Nichols & Shepard Co., 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752. See City of Pittsburg v. First Nat. Bank of Sheraden, 230 Pa. 176, 79 Atl. 406.

But where a depositor notified the bank not to allow the account to be overdrawn beyond a certain amount, and checks exceeding the limit, drawn by one authorized, were paid, it was held that the depositor could not by mere notice defeat the rights of the holders, nor the right of the bank to pay and charge to the account—the decision resting apparently on the right of a checkholder in Iowa to sue the bank. Bremer County Bank v. Mores, 73 Iowa, 289, 34 N. W. 863; post, p. 129. See "Corporations," Dec. Dig. (Key No.) §§ 425, 463; Cent. Dig. §§ 1820-1831; "Principal and Agent," Dec. Dig. (Key No.) § 109; Cent. Dig. §§ 318-322, 360-365.

²⁴³ Merchants' & Planters' Nat. Bank of Union v. Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750. See "Corporations," Dec. Dig. (Key No.) § 425; Cent. Dig. § 1697-1705.

²⁴⁴ McLean County Bank v. Mitchell, 88 Ill. 52; Thomas v. International Bank, 46 Ill. App. 461; Franklin Bank v. Byram, 39 Me. 489, 63 Am. Dec. 643. See, also, Burwell v. Burgwyn, 105 N. C. 498, 10 S. E. 1099. But see Lancaster Bank v. Woodward, 18 Pa. 357, 57 Am. Dec. 618.

The authority of a cashier to allow an overdraft cannot be questioned in an action by the bank. Union Gold Mining Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248. See "Banks and Banking," Dec. Dig. (Key No.) § 150; Cent. Dig. §§ 455-464½.

²⁴⁵ Loan & Exchange Bank v. Miller, 39 S. C. 175, 17 S. E. 592. See "Banks and Banking," Dec. Dig. (Key No.) § 150; Cent. Dig. §§ 455-464½.

²⁴⁶ Owens v. Stapp, 32 Ill. App. 653; Union Bank v. Sollee, 2 Strob. (S. C.) 390. See, also, Hubbard v. Charlestown Branch R. Co., 11 Metc. (Mass.) 124. Cf. Talbot v. First Nat. Bank, 106 Iowa, 361, 76 N. W. 726. See "Banks and Banking," Dec. Dig. (Key No.) § 150; Cent. Dig. §§ 455-464½.

of damages, and the rendering of an account showing a balance due from overdrafts is a sufficient demand.²⁴⁷ In an action for an overdraft, mere production of the check does not make a prima facie case; ²⁴⁸ but the bank must establish the overdraft by showing the whole state of the account, and all evidence going to show it, including checks, drafts, and notes paid, is admissible.²⁴⁹

When an account is overdrawn, the bank may, of course, apply subsequent general deposits to the payment of the balance due.²⁵⁰

STATEMENT OF ACCOUNT

26. EFFECT—Where a bank renders a statement of a depositor's account, accompanied by his checks and other vouchers for payments made and charged, such statement, if retained by the depositor without objection within a reasonable time, constitutes an account stated, which may be impeached only for fraud or mistake.

27. DUTY OF DEPOSITOR—It is the duty of the depositor, within a reasonable time, to examine such statement and vouchers, and to exercise reasonable diligence therein, and to notify the bank of an erroneous charge, such as a charge for the payment of a forged check; and if he fails so to do, and the

²⁴⁷ *Casey v. Carver*, 42 Ill. 225. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 150; *Cent. Dig.* §§ 455-464½.

²⁴⁸ *State Bank v. Clark*, 8 N. C. 36; *Bank of the United States v. Washington*, Fed. Cas. No. 940, 3 Cranch C. C. 295. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 150; *Cent. Dig.* §§ 455-464½.

²⁴⁹ *Jack v. Moyer*, 187 Pa. 87, 40 Atl. 1013. See, also, *Hudson Trust Co. v. Chappelle* (Sup.) 108 N. Y. Supp. 1005; *Cox v. Bank of Hartsville* (Tenn. Ch.) 63 S. W. 237; *Walker Bros. v. Skliris*, 34 Utah, 353, 98 Pac. 114. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 150; *Cent. Dig.* §§ 455-464½.

²⁵⁰ *First Nat. Bank v. City Nat. Bank*, 102 Mo. App. 357, 76 S. W. 489. See *Nichols v. State*, 46 Neb. 715, 65 N. W. 774. Cf. *Hale v.*

bank, if thereafter required to correct the error, would thereby suffer damage, the depositor is precluded, at least to that extent, from disputing the right of the bank to make the erroneous charge.

Effect of Statement

It is customary for the bank to make a statement of the depositor's account from time to time. Usually this is done by balancing the pass book and returning it to the customer, with the checks drawn by him and other orders for payments which have been made and charged to the account.

The sending of the pass book to be written up and returned with the vouchers is, in effect, a demand to know what the bank claims to be the state of the account; and the return of the book with the vouchers is the answer to that demand, and, in effect, imports a request that the depositor will in proper time examine the account so rendered, and either sanction it or repudiate it.²⁵¹ When the pass book is written up and is retained by the depositor, without objection within a reasonable time, it constitutes an account stated; and thereafter it can be impeached only for fraud or mistake.²⁵² Charges for interest or commissions, for example, cannot be questioned by the depositor if he has failed to object to them within a rea-

Richards, 80 Iowa, 164, 45 N. W. 734; *Bank of United States v. Macalester*, 9 Pa. 475.

Where a letter inclosing a note asked the bank to discount it and to charge an overdraft to the credit, the banker, having declined the credit, could not hold the note as collateral. *Bank of Montreal v. White*, 154 U. S. 660, 14 Sup. Ct. 1191, 26 L. Ed. 307; ante, p. 20. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 150; *Cent. Dig.* §§ 455-464½.

²⁵¹ *Harlan, J., in Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811. See "*Account Stated*," *Dec. Dig. (Key No.)* § 6; *Cent. Dig.* § 35.

²⁵² *Farry v. Farmers' & Mechanics' Bank* (N. J. Ch.) 58 Atl. 305; *Nodine v. First Nat. Bank*, 41 Or. 386, 68 Pac. 1109. But see *McGraw v. Traders' Nat. Bank*, 64 W. Va. 509, 63 S. E. 398. See "*Account Stated*," *Dec. Dig. (Key No.)* § 6; *Cent. Dig.* § 35.

sonable time.²⁵³ The writing up of a pass book with a return of the vouchers does not, of course, preclude the bank, if it has made mistakes in favor of the depositor, from having them corrected; nor does the mere failure of the depositor to object to the statement within a reasonable time preclude the depositor from showing mistakes or fraud in the account; but after the lapse of a reasonable time for examination and correction the statement will be deemed *prima facie* correct, and the burden of showing fraud or mistake will be upon the party who disputes it.²⁵⁴

Duty of Depositor to Examine

A different question is presented where the depositor fails to object after discovering an error, or fails to examine the statement and vouchers within a reasonable time after their return, or fails to exercise reasonable diligence in such examination, and the bank, if thereafter required to correct an error in the account, would suffer an injury from which it might have protected itself, but for the negligence of the depositor. This question is frequently presented where the bank has returned among its vouchers a check which it was not authorized to pay, because the signature of the depositor was forged or because the check had been altered.²⁵⁵ In such cases it is now held that a duty rests upon the depositor, either personally or by his agent, to examine the vouchers within a reasonable time after their return, and that if he fails so to do, or fails to exercise ordinary diligence in such examination, and consequently fails to discover and to notify the bank of

²⁵³ *Schoonover v. Osborne*, 108 Iowa, 453, 79 N. W. 263; *Williamson v. Williamson*, L. R. 7 Eq. 542. See "*Account Stated*," *Dec. Dig. (Key No.)* §§ 6, 8; *Cent. Dig.* §§ 35, 50-56.

²⁵⁴ *McLaughlin v. First Nat. Bank of Pana*, 71 Ill. App. 329; *Farry v. Farmers' & Mechanics' Bank* (N. J. Ch.) 58 Atl. 305; *Weisser's Adm'rs v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731. See cases cited in notes 255, 256, post. See "*Account Stated*," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 91-93.

²⁵⁵ Post, p. 159.

the forgery, and the bank thereby suffers damage, he is precluded, at least to the extent of such damages,²⁵⁶ from disputing the right of the bank to charge him with the amount of

²⁵⁶ *First Nat. Bank of Birmingham v. Allen*, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; *Janin v. London & San Francisco Bank*, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529; *Weinstein v. National Bank of Jefferson*, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23. Compare *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, where Harlan, J., observes: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper, if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect, to falsify a stated account to the injury of the bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of negligence of the depositor, was prevented from promptly, and it may be effectively, exercising it."

A depositor, failing promptly to notify a bank after discovering a forgery, cannot recover of the bank irrespective of whether it could have protected itself had it been promptly notified. *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79. See, also, *Cunningham v. First Nat. Bank of Indiana*, 219 Pa.

the forged check, provided the forgery was not so that the bank could by proper care and skill have discovered it.²⁵⁷

In some cases the doctrine has been placed upon the ground that by his negligence the depositor either adopts the check as genuine and ratifies its payment,²⁵⁸ or else estops himself from asserting that it is a forgery.²⁵⁹ Other cases more consistently place it upon the ground that a duty to examine the account rests upon the depositor, and that for a neglect of such duty he is liable to the extent of the damages sustained by the bank in consequence of such neglect.²⁶⁰ "If the depositor has, by his negligence in failing to detect forgeries in his

310, 68 Atl. 731, 123 Am. St. Rep. 657. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

²⁵⁷ *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *First Nat. Bank of Birmingham v. Allen*, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; *Neal v. First Nat. Bank*, 26 Ind. App. 503, 60 N. E. 164; *Israel v. State Nat. Bank of New Orleans*, 124 La. 885, 50 South. 783; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Dana v. National Bank of Republic*, 132 Mass. 156; *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. 380; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672; *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 64 S. E. 950. Cf. *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576.

The depositor's failure to examine and notify is no defense, if the bank by reasonable care could have detected the forgery. *New York Produce Exchange Bank v. Houston*, 169 Fed. 785, 95 C. C. A. 251. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

²⁵⁸ *Dana v. National Bank of Republic*, 132 Mass. 156. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

²⁵⁹ *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79; *National Bank of Commerce of Tacoma, Wash., v. Tacoma Mill Co.*, 182 Fed. 1, 104 C. C. A. 441. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

²⁶⁰ *First Nat. Bank of Birmingham v. Allen*, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529; *National Dredg-*

checks and give notice thereof, caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default, but beyond that his liability should not extend."²⁶¹

Although the depositor delegates the examination of the vouchers to the same person who forged or altered the check, he is chargeable with the knowledge of that person, not upon the ground that he is affected with the knowledge gained by the agent in perpetrating the fraud, but upon the ground that, the duty of examination resting upon the depositor, he is charged with the neglect or fraud of his agent in making such examination.²⁶²

Cases of forged indorsements are to be distinguished, since the drawer of a check cannot be expected to know the signature of the payee or other indorsers, and an examination by

ing Co. v. President, etc., of Farmers' Bank, 6 Pennewill (Del.) 580, 69 Atl. 607, 16 L. R. A. (N. S.) 593, 130 Am. St. Rep. 158. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

²⁶¹ Cullen, J., in Critten v. Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. In this case it was also held that the negligence of a bank in paying to a clerk of the depositor a check which was plainly altered by the substitution of the word "Cash" for the name of the payee, and on which the number of dollars was also written over an erasure, without inquiry as to the alterations, renders the bank liable for loss thereby sustained, and contributes to the continuance of similar forgeries by the clerk, so as to defeat the liability of the depositor for loss to the bank from the payment of subsequently raised checks on the ground of his negligence in failing to examine the returned vouchers from the bank. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

²⁶² Leather Manufacturers' Nat. Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; First Nat. Bank of Birmingham v. Allen, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; Dana v. National Bank of Republic, 132 Mass. 156; Critten v. Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529; Myers v. Southwestern Nat. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672; Contra: Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Kenneth Inv. Co. v. National Bank of the Republic, 103 Mo. App.

the depositor would not disclose to him whether or not the indorsements are genuine, and consequently there can be no duty resting upon him to make such examination, and no estoppel by reason of his failure to examine indorsements.²⁶³

ACTION FOR DEPOSIT

28. DEMAND AND LIMITATION—An action by a depositor to recover a general deposit does not accrue, and the statute of limitations does not begin to run, until a demand for payment has been made; but a demand may be dispensed with, if the circumstances are such that it would be manifestly futile.

29. BURDEN OF PROOF—If a deposit was made, the burden is upon the bank to prove payment to a proper person.

Demand

Although the relation between the bank and its depositor is that of debtor and creditor, it is the undertaking of the bank

613, 77 S. W. 1002. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

²⁶³ *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; *German Savings Bank of Davenport v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; *Shipman v. Bank of the State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Harter v. Mechanics' Nat. Bank*, 63 N. J. Law, 578, 44 Atl. 715, 76 Am. St. Rep. 224; *Kearny v. Metropolitan Trust Co. of City of New York*, 110 App. Div. 236, 97 N. Y. Supp. 274; *United Security Life Ins. & Trust Co. of Pennsylvania v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97; *Pollard v. Wellford*, 99 Tenn. 113, 42 S. W. 23; *Brixen v. Deseret Nat. Bank*, 5 Utah, 504, 18 Pac. 43.

Failure to notify the bank immediately after discovery did not prevent recovery, in the absence of a showing that the position of bank was changed for worse by the delay. *Murphy v. Metropolitan*

to pay only at its banking house, when payment shall be called for there; that is, upon demand.²⁶⁴ Demand, therefore, is a condition precedent to the right of a depositor to maintain an action for the recovery of a deposit, unless for special reasons demand is excused.²⁶⁵ Demand, or the facts which excuse it, must be alleged in the declaration or complaint.²⁶⁶ The law does not generally require a man to do a futile act; and consequently the necessity of demand is dispensed with if the bank notifies the depositor that his demand will not be honored,²⁶⁷ or denies the existence of a deposit,²⁶⁸ or claims the deposit as its own²⁶⁹ or as another's,²⁷⁰ or accepts a deposit

Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595; Pratt v. Union Nat. Bank, 79 N. J. Law, 117, 75 Atl. 313. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

²⁶⁴ Ante, p. 56.

²⁶⁵ *Brahm v. Adkins*, 77 Ill. 263; *Clark's Adm'r v. Farmers' Nat. Bank of Richmond*, 124 Ky. 563, 99 S. W. 674; *Adams v. Orange County Bank*, 17 Wend. (N. Y.) 514; *Downes v. Phoenix Bank*, 6 Hill (N. Y.) 297 (although a balance has been struck in the bank book in the depositor's favor). See cases cited in note 277, post. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509, 510.

²⁶⁶ *Tobias v. Morris*, 126 Ala. 535, 28 South. 517. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 516-517.

²⁶⁷ *Farmers' & Mechanics' Bank of Georgetown v. Planters' Bank of Prince George's County*, 10 Gill & J. (Md.) 422. Passing the balanced deposit book back to the depositor, the attention of the parties not being directed to an overcharge, is not a refusal. *Goodell v. Brandon Nat. Bank*, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766. Where a check is paid on the forged indorsement of the payee, a demand for payment of the canceled check is not a condition precedent. *Pratt v. Union Nat. Bank*, 79 N. J. Law, 117, 75 Atl. 313. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509, 510.

²⁶⁸ *Miller v. Western Nat. Bank*, 172 Pa. 197, 33 Atl. 684. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509-510.

²⁶⁹ *Bank of Missouri v. Benoist*, 10 Mo. 520; *Delahunty v. Central Nat. Bank*, 37 App. Div. 434, 56 N. Y. Supp. 40. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509, 510.

²⁷⁰ *Carroll v. Cone*, 40 Barb. (N. Y.) 220. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509, 510.

upon an illegal agreement,²⁷¹ or suspends payment and discontinues the operations of banking.²⁷²

Statute of Limitation

The period of limitation within which an action to recover a deposit may be brought, of course depends upon the statute in the particular jurisdiction.²⁷³ Where the limitation was five years for an action "upon any agreement, contract or promise in writing," and three years for an action "upon a contract not in writing," it was held that a pass book is not a written contract, and that the three-year limitation governed.²⁷⁴ On the other hand, where the limitation was five years for actions "on unwritten contracts, express or implied," and ten years for actions "on written contracts, or other evidences of indebtedness in writing," it was held that the ten-year lim-

²⁷¹ *White v. President, etc., of Franklin Bank*, 22 Pick. (Mass.) 181. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509, 510.

²⁷² *Schinotti v. Whitney* (C. C.) 130 Fed. 780; *Wheeler v. Commercial Bank of Moscow*, 5 Idaho, 15, 46 Pac. 830; *White v. Meadowcroft*, 91 Ill. App. 293; *Planters' Bank of Prince George's County v. Farmers' & Mechanics' Bank of Georgetown*, 8 Gill & J. (Md.) 449; *Watson v. President, etc., of Phoenix Bank*, 8 Metc. (Mass.) 217, 41 Am. Dec. 500.

The mere appointment of a temporary receiver pending an action for the bank's dissolution, instituted by the superintendent of banking without consent of the bank officers, does not excuse demand. *Sickles v. Herold*, 149 N. Y. 332, 43 N. E. 852. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509, 510.

²⁷³ See *Pott v. Clegg*, 16 M. & W. 327; *Schinotti v. Whitney* (C. C.) 130 Fed. 780 (Louisiana statute); *Green v. Odd Fellows Savings & Commercial Bank*, 65 Cal. 71, 2 Pac. 887 (no limitation); *Cole v. Charles City Nat. Bank*, 114 Iowa, 632, 87 N. W. 671; *Quattrochi v. Farmers' & Merchants' Bank*, 89 Mo. App. 500. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 504-507; "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 25; *Cent. Dig.* § 126.

²⁷⁴ *Talcott v. First Nat. Bank*, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 504-507; "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 504-507.

itation governed.²⁷⁵ A publication of unclaimed deposits, made in pursuance of a statute, has been held to be an acknowledgment of indebtedness, suspending the operation of the statute of limitations.²⁷⁶

Since an action to recover a deposit does not accrue until a payment has been demanded and refused, the statute does not begin to run until demand,²⁷⁷ unless demand has been waived or is otherwise excused.²⁷⁸ Although by the better rule the holder of a check cannot maintain an action against the bank, the presentment of a check by the holder is a sufficient demand, and the refusal of the bank to honor a check so presented sets the statute running.²⁷⁹ The demand is not suffi-

²⁷⁵ *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 504-507; "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 25; *Cent. Dig.* § 126.

²⁷⁶ *Adams v. Orange County Bank*, 17 Wend. (N. Y.) 514. See "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 584.

²⁷⁷ *Starr v. Stiles*, 2 Ariz. 436, 19 Pac. 225; *Branch v. Dawson*, 33 Minn. 399, 23 N. W. 552; *Missouri Pac. Ry. Co. v. Continental Nat. Bank*, 212 Mo. 505, 111 S. W. 574, 17 L. R. A. (N. S.) 994; *Citizens' Bank of Humphrey v. Fromholz*, 64 Neb. 284, 89 N. W. 775; *Girard Bank v. Bank of Penn Tp.*, 39 Pa. 92, 80 Am. Dec. 507; *Koelzer v. First Nat. Bank of Whitewater*, 125 Wis. 395, 104 N. W. 838, 2 L. R. A. (N. S.) 571, 110 Am. St. Rep. 870. Contra: *Locke v. First Nat. Bank of Gonic*, 65 N. H. 670, 23 Atl. 529 (runs from deposit).

The statute begins to run from the date of the monthly balance struck in the depositor's bank book. *President, etc., of Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181. See "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 66; *Cent. Dig.* §§ 260, 362; "*Banks and Banking*," *Cent. Dig.* § 509.

²⁷⁸ See cases cited in notes 267-272, ante. See "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 66; *Cent. Dig.* § 362.

²⁷⁹ *Munnerlyn v. Augusta Savings Bank*, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; *Viets v. Union Nat. Bank of Troy*, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

Where the bank paid a check under a forged indorsement, and on discovering the forgery after seven years the depositor made demand, the check was not a demand, and the action was not barred.

cient if the check exceeds the amount of the depositor's balance.²⁸⁰ Drawing a check for the balance standing to the depositor's credit is a demand, however, only for that amount, and the statute does not begin to run from the time of presentment as to an amount with which he had been charged by mistake, to which the attention of the parties was not then directed.²⁸¹

Burden of Proof

Where it appears that a deposit has been made, the burden is upon the bank to prove payment to or for the use of the depositor.²⁸² If the bank has paid a check to an indorsee, for which it claims credit, the burden is upon the bank to prove the genuineness of the indorsement.²⁸³ But if the bank has

Bank of British North America v. Merchants' Nat. Bank, 91 N. Y. 106. See "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 66; *Cent. Dig.* § 362.

²⁸⁰ Aurora Nat. Bank v. Dils, 18 Ind. App. 319, 48 N. E. 19. See, also, Hales v. Seamen's Bank, 28 App. Div. 407, 51 N. Y. Supp. 140. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509, 510; "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 66; *Cent. Dig.* §§ 353-375.

²⁸¹ Goodell v. Brandon Nat. Bank, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 509, 510; "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 66; *Cent. Dig.* §§ 353-375.

²⁸² De Land v. Dixon Nat. Bank, 111 Ill. 323; Padgett v. Bank of Mountain View, 141 Mo. App. 374, 125 S. W. 219; Patterson v. First Nat. Bank of Humboldt, 73 Neb. 384, 102 N. W. 765; Wiggins v. Stevens, 33 App. Div. 83, 53 N. Y. Supp. 90; Yarborough v. Banking Loan & Trust Co., 142 N. C. 377, 55 S. E. 296; O'Neil v. New England Trust Co., 28 R. I. 311, 67 Atl. 63, 11 L. R. A. (N. S.) 248, 125 Am. St. Rep. 740; Kuenster v. Woodhouse, 101 Wis. 216, 77 N. W. 165. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 518-521.

²⁸³ Morgan v. Bank of State of New York, 1 Duer (N. Y.) 434; August v. Fourth Nat. Bank, 48 Hun, 620, 1 N. Y. Supp. 139. See, also, Second Nat. Bank of New Albany v. Gibboney, 43 Ind. App. 492, 87 N. E. 1064.

The burden is on the bank to show that the payment was to the

rendered a statement of the account, which the depositor has retained for an unreasonable time without objection, the burden is upon him to show that the statement was erroneous.²⁸⁴ Where the depositor has given the bank timely notice not to pay a check, the burden is on the bank to prove that it had already been paid.²⁸⁵

Prima facie the title to a deposit is in the depositor,²⁸⁶ and if the bank pays to another the burden is upon it to show that he was entitled to it.²⁸⁷

A claimant in an interpleader suit must show a clear title.²⁸⁸

person named in the check, or that the depositor was guilty of negligence precluding him from disputing it. *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 518-521.

²⁸⁴ *Anderson v. Leverich*, 70 Iowa, 741, 30 N. W. 39; *August v. Fourth Nat. Bank*, 48 Hun, 620, 1 N. Y. Supp. 139. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 518-521.

²⁸⁵ *Albers v. Commercial Bank*, 85 Mo. 173, 55 Am. Rep. 355. Cf. *Brandt v. Public Bank*, 139 App. Div. 173, 123 N. Y. Supp. 807. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 518-521.

²⁸⁶ *Egbert v. Payne*, 99 Pa. 239; ante, p. 43. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 518-521.

²⁸⁷ *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 518-521.

²⁸⁸ *Detroit Savings Bank v. Haines*, 128 Mich. 38, 87 N. W. 66. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* §§ 518-521.

CHAPTER III

CHECKS

30. Definition.
31. Liability of Drawer to Holder—In General.
32. Presentment and Notice of Dishonor.
33. Reasonable Time for Presentment.
34. Negotiability and Transfer—In General.
35. Liability of Indorser.
36. Holder in Due Course.
37. Liability of Drawee to Holder.
38. Certified Checks—Liability of Bank.
39. Liability of Drawer and Indorsers.

CHECKS

30. DEFINITION—A check is an unconditional order in writing, addressed to a bank or banker, signed by the person giving it, requiring the bank or banker to pay on demand a sum certain in money to a designated person, or to order, or to bearer. In other words, a check is an instrument in the form of a bill of exchange, drawn on a bank or banker, and payable on demand.

In General

It is by the means of checks drawn upon his bank that a depositor usually obtains payment of his funds on deposit. In form a check is a bill of exchange, and it is distinguishable from other bills of exchange only in being (1) drawn upon a bank, and (2) payable on demand.¹ Ordinarily the name of

¹ Whistler v. Forster, 14 C. B. (N. S.) 248; McLean v. Clydesdale Banking Co., 9 App. Cas. 95; Bowen v. Needles Nat. Bank (C. C.) 87 Fed. 430; Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326; Farmers' Bank of Nashville v. Johnson, King & Co., 134 Ga. 486, 68 S. E. 85, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242; Lester

the bank appears at the top of the instrument, immediately after the date, instead of at the end of the instrument, preceded by the word "To," as in the case of bills of exchange. The word "demand" is not used; but the order, which is a mere order to pay, without designation of the time of payment, is in legal effect an order to pay on demand.

It is often said, or within the terms of some statute held, that a check is a bill of exchange,² although it is, of course, always conceded that a check has many peculiar incidents, and that all the rules governing a bill of exchange are not applicable to a check. A check is defined by the Negotiable Instruments Law as "a bill of exchange drawn on a bank payable on demand," and the same section adds: "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."³ This is well enough, but the exceptions are of so great importance that it is not improper to describe a check as a distinct commercial instrument.⁴

v. Given, 8 Bush (Ky.) 357; Weiland's Adm'r v. State Nat. Bank of Maysville, 112 Ky. 310, 65 S. W. 617, 56 L. R. A. 178; Exchange Bank of Wheeling v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Bowen v. Newell, 8 N. Y. 190; Hobart Nat. Bank v. McMurrugh, 24 Okl. 210, 103 Pac. 601. See, also, cases post, notes 16, 19. See "*Bills and Notes*," Dec. Dig. (Key No.) § 15; Cent. Dig. §§ 20, 21.

² Rogers v. Durant, 140 U. S. 298, 11 Sup. Ct. 754, 35 L. Ed. 481; Garrettson v. North Atchison Bank (C. C.) 47 Fed. 867; First Nat. Bank of Montgomery v. Nelson, 105 Ala. 180, 16 South. 707; Laird v. State, 61 Md. 309; People v. Kemp, 76 Mich. 410, 43 N. W. 439; German Nat. Bank of Beatrice v. Beatrice Nat. Bank, 63 Neb. 246, 88 N. W. 480. See "*Bills and Notes*," Dec. Dig. (Key No.) §§ 1, 15; Cent. Dig. §§ 1, 20, 21.

³ Negotiable Instruments Law, § 185.

⁴ Keene v. Beard, 8 C. B. (N. S.) 380; Hopkinson v. Forster, L. R. 19 Eq. 76; Mullick v. Radakissen, 9 Moore P. C. 69; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 647, 19 L. Ed. 1008; Bullard v. Randall, 1 Gray (Mass.) 605, 609, 61 Am. Dec. 433; Blair v. Wilson, 69 Va. 170. See "*Bills and Notes*," Dec. Dig. (Key No.) §§ 1, 15; Cent. Dig. §§ 1, 20, 21.

The principal differences between a check and a demand bill of exchange are in respect to the rules governing (1) the liability of the drawer, who is chargeable, notwithstanding delay in presentment of the check unless he has actually been prejudiced by the delay,⁵ and (2) the rights of the parties upon certification.⁶ In some jurisdictions the rule has prevailed that a check is an assignment pro tanto of the drawer's funds, and confers a right of action upon the holder against the drawee upon the refusal, if in funds, to pay the check;⁷ but since the general enactment of the Negotiable Instruments Law there are few jurisdictions, if there are any, where this rule survives.⁸ Among the distinguishing characteristics of checks, as contradistinguished from bills of exchange, are sometimes enumerated, also, the features that they are payable immediately on presentment, without allowance of any days of grace, and that they are never presentable for acceptance, but only for payment;⁹ but these features they have in common with demand bills of exchange.

Bank or Banker

To be a check, the order must be drawn on a bank or banker.¹⁰ If drawn on any other person, the instrument is a bill of exchange, and not a check.¹¹ It seems that it need not appear on the face of the instrument that the drawee is a bank,¹² but it is safer that this should appear; for it seems that otherwise a bona fide holder without knowledge that it

⁵ Post, p. 107.

⁷ Post, p. 127.

⁶ Post, p. 131.

⁸ Post, p. 130.

⁹ See *In re Brown*, 2 Story, 502, Fed. Cas. No. 1,985. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 1, 15; *Cent. Dig.* §§ 1, 20, 21.

¹⁰ See cases ante, note 1; post, note 19. Contra: *Industrial Bank of Chicago v. Bowes*, 165 Ill. 70, 46 N. E. 10, 56 Am. St. Rep. 228. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* §§ 14-18.

¹¹ *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858 (although styled a check on its face). See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* §§ 14-18.

¹² See *Planters' Bank v. Keesee*, 7 Heisk. (Tenn.) 200. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* §§ 14-18.

is drawn on a bank may treat it as a bill of exchange. On the other hand, it seems that the mere designation of the drawee as a bank, if the drawee is not in fact such, does not make the instrument a check. An instrument purporting to be drawn on a bank, when the bank had gone into liquidation, has been held not to be a check.¹³

Foreign Bank

Whether an instrument, otherwise in the form of a check, drawn upon a bank in another state or county in the form in which drafts are commonly made by banks for the purpose of remitting money, is a check or a bill of exchange, has been questioned. Although there are decisions to the contrary,¹⁴ it is almost universally held that such instruments are checks.¹⁵

Payable on Demand

Whether an instrument which is otherwise in the form of a check, but is by its terms drawn payable on a day subsequent to its date, is such, is a question on which there has been much controversy. It is conceded that a check is not entitled to days of grace,¹⁶ while a bill of exchange payable at a future date is entitled to grace in jurisdictions where grace has not been abolished by statute. Consequently, in determin-

¹³ *Harmanson v. Bain*, 1 Hughes, 188, Fed. Cas. No. 6,072. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 3, 6; *Cent. Dig.* §§ 7, 8, 14-18.

¹⁴ *Grammel v. Carmer*, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363 (semble). See, also, *La Due v. First Nat. Bank of Kasson*, 31 Minn. 33, 16 N. W. 426. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 1, 13, 15; *Cent. Dig.* §§ 1, 20, 21, 28.

¹⁵ *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; *First Nat. Bank v. Coates* (C. C.) 8 Fed. 540; *Bowen v. Needles Nat. Bank* (C. C.) 87 Fed. 430; *Merchants' Nat. Bank v. Ritzyger*, 118 Ill. 484, 8 N. E. 834; *Harrison v. Wright*, 100 Ind. 515, 58 Am. Rep. 805. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 1, 13, 15; *Cent. Dig.* §§ 1, 20, 21, 28.

¹⁶ *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. 239. See cases ante, note 15; post, note 17. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 297-309.

ing whether a draft upon a bank payable at a future day is entitled to grace, it has frequently been deemed necessary to decide the question whether or not it is a check. In some cases the affirmative has been held;¹⁷ but by the great weight of authority such instruments have been held to be bills of exchange, and not checks, and hence entitled to grace.¹⁸ The prevailing rule that they are not checks is probably in accord with the practice of bankers and business usage, and it has been adopted by the Negotiable Instruments Law, which incorporates in its definition of a check the requirement that it be "payable on demand."¹⁹

Memorandum Checks

Where the word "memorandum" or "memo" is written across the face of a check, it is called a memorandum check. A memorandum check is understood by custom, where such checks are used, to be payable by the drawer absolutely, without demand on the bank or notice of dishonor.²⁰ The effect is the same as if the words "presentment waived" were used. In other respects a memorandum check is like an ordinary check, and it is the duty of the bank, as against the drawer, to pay it on presentment as in the case of an ordinary check.²¹

¹⁷ *In re Brown*, 2 Story, 502, Fed. Cas. No. 1,985; *Way v. Towle*, 155 Mass. 374, 29 N. E. 506, 31 Am. St. Rep. 552; *Champion v. Gordon*, 70 Pa. 475, 10 Am. Rep. 681; *Westminster Bank v. Wheaton*, 4 R. I. 30. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 297-309.

¹⁸ *Minturn v. Fisher*, 4 Cal. 35; *Bradley v. Delaplaine*, 5 Har. (Del.) 305; *Georgia Nat. Bank v. Henderson*, 46 Ga. 487, 12 Am. Rep. 590; *Culter v. Reynolds*, 64 Ill. 321; *Harrison v. Nicolle*, Nat. Bank of Minneapolis, 41 Minn. 488, 43 N. W. 336, 5 L. R. A. 746, 16 Am. St. Rep. 718; *Ivory v. Bank of Missouri*, 36 Mo. 475, 88 Am. Dec. 150; *Bowen v. Newell*, 8 N. Y. 190; *Woodruff v. Merchants' Bank of City of New York*, 25 Wend. (N. Y.) 673; *Morrison v. Bailey*, 5 Ohio St. 13, 64 Am. Dec. 632; *Hawley v. Jette*, 10 Or. 31, 45 Am. Rep. 129; *Brown v. Lusk*, 4 Yerg. (Tenn.) 210. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 297-309.

¹⁹ Negotiable Instruments Law, § 185.

²⁰ *Post*, p. 107.

²¹ *Franklin Bank v. Freeman*, 16 Pick. (Mass.) 535; *Cushing v.*

Other Formal Requisites

Except in respect to the requirements that a check must be drawn on a bank and payable on demand, the formal requisites of a check are the same as those of a bill of exchange.²² In other words, it must contain an unconditional order for the payment of a certain sum of money only; it must be specific as to all its parties, and must be signed;²³ and it must be delivered.²⁴

Date

A date is not necessary to the validity of a bill of exchange or a promissory note.²⁵ If an instrument is not dated, it will be considered as dated as of the time it was issued.²⁶ It has been suggested that an undated check is never payable,²⁷ but this may be doubted.²⁸ Certainly it cannot hold true under the Negotiable Instruments Law, which provides that the validity and negotiable character of a bill or note is not affected by the fact that it is not dated, and makes this rule applicable also to checks.²⁹ It seems, however, that in order to render the bank liable to the drawer for failure to pay a check, and to protect the bank in paying it, should it for any reason turn out to be subject to defenses as between the drawer and holder, it should be dated; for the absence of a date

Gore, 15 Mass. 69; *Turnbull v. Osborne*, 12 Abb. Prac. N. S. (N. Y.) 200. See, also, *Kelley v. Brown*, 5 Gray (Mass.) 108; *Skillman v. Titus*, 32 N. J. Law, 96; *Dykers v. Leather Mfg.'s Bank*, 11 Paige (N. Y.) 612. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 395; *Cent. Dig.* §§ 996-1021.

²² See Negotiable Instruments Law, § 185.

²³ See Negotiable Instruments Law, § 126.

²⁴ See Negotiable Instruments Law, § 16.

²⁵ Norton, *Neg. Inst.* (3d Ed.) 72.

²⁶ See Negotiable Instruments Law, § 17 (3).

²⁷ Morse, *Banks & B.* (4th Ed.) § 368.

²⁸ See *Gordon v. Lansing State Savings Bank*, per Carpenter, J., 133 Mich. 143, 94 N. W. 741; *Crawford v. West Side Bank*, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 8, 129; *Cent. Dig.* §§ 4, 283-292.

²⁹ Negotiable Instruments Law, §§ 6 (1), 185.

would properly put the bank upon inquiry as to how long the check had been outstanding.³⁰ If a blank be left for the date, any legal holder may fill in the true date, and a holder in due course may enforce it as if the date had been correctly filled in.³¹

A check may be antedated, in which case it is payable immediately.³² And notwithstanding that an instrument in the form of a check is not such if it is payable on a day subsequent to its date, a check may be postdated.³³ A postdated check is payable on demand at or after its date,³⁴ and is not irregular, so as to charge the holder with notice of equities.³⁵

Designation of Payee

A check may order payment to a person named in it,³⁶ or to him or his order,³⁷ or to him or bearer, or simply to bearer.³⁸ Failure to designate a payee, or to designate him with sufficient certainty, will render the writing inoperative as a

³⁰ Post, p. 151.

³¹ See Negotiable Instruments Law, § 14. Under section 13, it seems that the right to insert the true date of issue, if no blank be left therefor, is not given to the holder of a check.

³² See Negotiable Instruments Law, § 12.

³³ Burns v. Kahn, 47 Mo. App. 215; Symonds v. Riley, 188 Mass. 470, 74 N. E. 926; Royal Bank v. Tottenham, [1894] 2 Q. B. 715. See Negotiable Instruments Law, § 12. See "*Bills and Notes*," Dec. Dig. (Key No.) § 8; Cent. Dig. § 4.

³⁴ Salter v. Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530. See "*Bills and Notes*," Dec. Dig. (Key No.) §§ 129, 130; Cent. Dig. §§ 288, 298-302.

³⁵ Hitchcock v. Edwards, 60 L. T. Rep. 636. See "*Bills and Notes*," Dec. Dig. (Key No.) § 342; Cent. Dig. § 832.

³⁶ "I conceive it to be still a check, * * * although payable to a particular party only by name." Per Story, J., In re Brown, 2 Story, 502, Fed. Cas. No. 1,985. See "*Bills and Notes*," Dec. Dig. (Key No.) § 6; Cent. Dig. §§ 7, 8, 20, 21.

³⁷ See Charles v. Blackwell, 2 C. P. D. 156; Eyre v. Walker, 5 H. & N. 463; In re Brown, 2 Story, 502, Fed. Cas. No. 1,985; Bowen v. Newell, 8 N. Y. 190. See "*Bills and Notes*," Dec. Dig. (Key No.) § 6; Cent. Dig. §§ 7, 8, 20, 21.

³⁸ Some of the earlier cases declared that a check must be pay-

check.³⁹ A check payable to a person named in it, without words of negotiability, is not negotiable.⁴⁰ But where a check is delivered with the name of the payee left blank, the person to whom it is delivered may insert his own name as payee.⁴¹ A check may be to the order of a fictitious or nonexisting person, provided, at least, the fact that he is fictitious or non-existent be known to the drawer, in which case the check is generally held to be payable to bearer, and transferable by delivery.⁴² A check may also be so drawn that the name of the payee does not purport to be the name of any person, as to the order of "Bills Payable," "Rent," "1658," "Cash," and other words indicating the purpose to which it is to be applied, in which case the instrument is deemed to be payable to bearer.⁴³

able to bearer. See *Woodruff v. Merchants' Bank of City of New York*, 25 Wend. (N. Y.) 673. Cf. *Charles v. Blackwell*, 2 C. P. D. 156. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 6; *Cent. Dig.* §§ 7, 8.

³⁹ See *Reed v. Mattapan Deposit & Trust Co.*, 198 Mass. 306, 84 N. E. 469.

A writing addressed to a bank: "Pay to the order of, on sight, \$200" is not a check, because no payee is indicated. *McIntosh v. Lytle*, 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410. See, also, *Gordon v. Lansing State Sav. Bank*, 133 Mich. 143, 94 N. W. 741. Cf. *Davega v. Moore*, 3 McCord (S. C.) 482. See post, note 43. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 6, 153; *Cent. Dig.* §§ 7, 389.

⁴⁰ See *Mechanics' Bank of New York v. Straiton*, *42 N. Y. 365; *Negotiable Instruments Law*, §§ 1 (4), 126, 185. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 147; *Cent. Dig.* § 363.

⁴¹ *People v. Gorham*, 9 Cal. App. 341, 99 Pac. 391. See, also, *McIntosh v. Lytle*, 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410; *Negotiable Instruments Law*, § 14; *Norton, Bills & N.* (3d Ed.) 258. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 85-94.

⁴² So provided by *Negotiable Instruments Law*, § 9 (3). See *Boles v. Harding*, 201 Mass. 103, 87 N. E. 481; *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 6; *Cent. Dig.* § 8.

⁴³ *Vere v. Lewis*, 3 Term R. 183; *Willets v. Phoenix Bank*, 2 Duer (N. Y.) 121; *Mechanics' Bank of New York v. Straiton*, *42 N. Y. 365; *Cleary v. De Beck Plate Glass Co.*, 54 Misc. Rep. 537, 104 N.

Form of Order

The order for payment must be in its terms absolute and unconditional.⁴⁴ An order in form, "Pay L., or order, \$120, and charge to my account on book No. ———," and containing on its face the words "The bank book of the depositor must accompany this order," is conditional within this rule.⁴⁵ But an order, "Pay this, our first check (second unpaid)," is not conditional; both of the so-called "checks" being simply parts of a set and constituting one check, and payment of either of which is a discharge of the check, after the manner of foreign bills drawn in sets.⁴⁶

A practice has recently come into common use of drawing so-called voucher checks—that is, checks in such form that the signature or indorsement of the payee thereon operates

Y. Supp. 831 (Cash). See, also, *McIntosh v. Lytle*, 26 Minn. 336, 3 N. W. 983, 37 Am. St. Rep. 410; *Negotiable Instruments Law*, § 9 (4).

In *Gordon v. Lansing State Savings Bank*, 133 Mich. 143, 94 N. W. 741, a writing addressed to a bank, "Pay to the order of ——— \$970," was held by a divided court not payable to bearer, or to an impersonal payee, but void for want of a payee. Here a line was drawn through the blank in the form left for the insertion of the name of a payee, and the rule applicable to filling a blank purposely left did not apply; but it seems that the instrument might properly have been treated as payable to the order of an impersonal payee, to "the order" of a line, and so payable to bearer. See *Davega v. Moore*, 3 McCord (S. C.) 482; 17 Harv. Law Rev. 199. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 6; *Cent. Dig.* §§ 7, 8.

⁴⁴ See *Negotiable Instruments Law*, § 126.

A check may be made payable through another bank. *Farmers' Bank of Nashville v. Johnson, King & Co.*, 134 Ga. 486, 68 S. E. 85, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 4; *Cent. Dig.* §§ 22-25.

⁴⁵ *White v. Cushing*, 88 Me. 339, 34 Atl. 164, 32 L. R. A. 590, 51 Am. St. Rep. 402. See, also, *Iron City Nat. Bank v. McCord*, 139 Pa. 52, 21 Atl. 143, 11 L. R. A. 559, 23 Am. St. Rep. 166. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 1, 4, 20; *Cent. Dig.* §§ 1, 22-25.

⁴⁶ *Merchants' Nat. Bank v. Ritzinger*, 118 Ill. 484, 8 N. E. 834. See *Negotiable Instruments Law*, §§ 178-183, 185. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 4; *Cent. Dig.* §§ 22-25.

as a receipt of payment of the particular indebtedness for which the check is issued; the nature of the transaction creating the indebtedness, as such and such goods sold or services rendered, being recited in the margin or elsewhere upon the paper. If the order to the bank to pay is conditional upon the signing by the payee of a receipt, it seems that the order is conditional, and that the instrument is not a check.⁴⁷ If, however, the order is in such terms that the authority of the bank to pay is not made conditional upon the signature of a receipt, the instrument is a check, notwithstanding that the payee may voluntarily affix his signature to a writing that operates as a receipt.⁴⁸

Payment in Money Only

Checks, like bills of exchange and promissory notes, must be payable in money; that is, legal tender.⁴⁹ The principal question that has arisen under this rule is whether an instrument by its terms payable in "currency," or "in current funds," is a check. While some courts deny this,⁵⁰ construing these terms as broader than mere legal tender, the preponderance of authority is in favor of construing the terms as equivalent to legal tender, and consequently in favor of holding such instruments to be checks.⁵¹

⁴⁷ An order to pay "provided the receipt form at foot hereof is signed, stamped, and dated" is not unconditional, and not a check. *Bavius v. London & S. W. Bank* [1900] 1 Q. B. 270. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 4; *Cent. Dig.* §§ 22-25.

⁴⁸ Where at the foot was written "the receipt at the back hereof must be signed, and signature will be taken as an indorsement of the check," and on the back was a form of receipt, the words at the foot not being addressed to the bankers and not affecting the order, the order to pay was said to be unconditional, and the check negotiable. *Nathans v. Ogdens*, 21 L. T. R. 775. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 4; *Cent. Dig.* §§ 22-25.

⁴⁹ See Negotiable Instruments Law, § 1(2)—"sum certain in money."

⁵⁰ *Bank of Mobile v. Brown*, 42 Ala. 108 (currency); *Dille v. White*, 132 Iowa, 327, 109 N. W. 909 (current funds). See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 11, 162; *Cent. Dig.* §§ 11-13.

⁵¹ *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed.

Where the sum payable is expressed in both words and figures, the words control, if there be a discrepancy.⁵²

Where the amount is left blank, the person in possession has prima facie authority to fill in the blank, and a bona fide purchaser for value may enforce the check for that amount, even if the blank was filled in for an amount in excess of the actual authority.⁵³

Signature

A check must, of course, be signed by the drawer;⁵⁴ but the place of his signature is immaterial, provided it appears to have been intended for his signature.⁵⁵ The signature may be in pencil,⁵⁶ printed or stamped, and it may be by the drawer's mark;⁵⁷ but in all such cases it seems that the bank would be justified in refusing to pay a check without sufficient evidence that the signature was that of the drawer or his duly constituted agent.⁵⁸

97; ante, p. 78. See Norton, Bills & N. (3d Ed.) p. 43. Negotiable Instruments Law, § 6, provides merely that "the validity and negotiable character of an instrument are not affected by the fact that it * * * designates a particular kind of current money in which payment may be made." See "*Bills and Notes*," Dec. Dig. (Key No.) §§ 11, 131; Cent. Dig. §§ 11-13, 310-315.

⁵² See Negotiable Instruments Law, § 17.

⁵³ Under Negotiable Instruments Law, § 14, the blank must be filled up within a reasonable time. *Madden v. Gaston*, 137 App. Div. 294, 121 N. Y. Supp. 951. See, also, *Rodgers v. Baker*, 136 App. Div. 851, 122 N. Y. Supp. 91. See "*Bills and Notes*," Dec. Dig. (Key No.) § 60; Cent. Dig. §§ 85-94.

⁵⁴ See Negotiable Instruments Law, §§ 18, 126, 185.

⁵⁵ See *Palmer v. Stephens*, 1 Denio (N. Y.) 471; *Merchants' Bank v. Spicer*, 6 Wend. (N. Y.) 443. See "*Bills and Notes*," Dec. Dig. (Key No.) § 54; Cent. Dig. §§ 72-74.

⁵⁶ See *Geary v. Physic*, 5 Barn. & C. 234; *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127. See "*Bills and Notes*," Dec. Dig. (Key No.) § 54; Cent. Dig. §§ 72-75.

⁵⁷ See *Pennington v. Baehr*, 48 Cal. 565; *Shank v. Butsch*, 28 Ind. 19; *Commonwealth v. Ray*, 3 Gray (Mass.) 441; *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755. See "*Bills and Notes*," Dec. Dig. (Key No.) § 54; Cent. Dig. §§ 72-75.

⁵⁸ Post, p. 159.

LIABILITY OF DRAWER TO HOLDER

31. IN GENERAL—The drawer engages that on due presentment of the check to the drawee for payment it will be paid, and that if it be dishonored, and due notice of such dishonor be given to him, he will pay the amount to the holder.

32. PRESENTMENT AND NOTICE OF DISHONOR—

A check must be presented within a reasonable time after its issue, and due notice of dishonor must be given, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay in presentment or in giving notice or by the failure to give notice; but the drawer will not be discharged by delay in presentment, or, unless it is otherwise provided by statute, by delay in giving notice of dishonor or by failure to give notice, unless he has suffered loss thereby. Presentment and notice of dishonor, and delay therein, are excused, where the circumstances exist which would operate as such excuse in respect to a bill of exchange.

33. REASONABLE TIME FOR PRESENTMENT—In determining what is a reasonable time, regard must be had to the nature of the instrument, the usage of the trade or business, if any, with respect to such instruments, and the facts of the particular case; but in the absence of a different usage, or of special circumstances, a check is not deemed to have been presented within a reasonable time, unless it be presented within the time limited by the following rules:

- (1) If the payee or other holder to whom it is delivered and the bank are in the same place, it must be presented during business hours on the next business day after its receipt.

- (2) If such payee or other holder of the bank are in different places, it must be forwarded on the next business day after its receipt to the place where the bank is located for presentment, and the agent to whom it is sent must present it during business hours on the next business day after its receipt by him.

In General

While a check is in the form of a bill of exchange, the same strict rules of diligence in respect to presentment and notice of dishonor are not required of the holder who may seek to charge the drawer. When a man draws a check, he should have money in the bank to meet it, and there it ought to remain until called for by the holder; and unless the drawer actually suffers from the delay, as by the intermediate failure of the bank, he has no reason to complain of delay on the part of the holder in calling for the money. If, however, the delay is unreasonable, and the drawer is prejudiced thereby, he will be discharged from his obligation, to the extent of his loss, but only to that extent.⁵⁹ "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from the liability thereon to the extent of the loss caused by the delay."⁶⁰ Thus, if the holder

⁵⁹ *Serle v. Norton*, 2 Moody & R. 401; *Robinson v. Hawksford*, 9 Q. B. 52; *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; *In re Brown*, 2 Story, 502, Fed. Cas. No. 1,985; *Bowen v. Needles Nat. Bank (C. C.)* 87 Fed. 430; *Andrus v. Bradley (C. C.)* 102 Fed. 54; *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 27 S. E. 979, 38 L. R. A. 749; *Brown v. Schintz*, 203 Ill. 136, 67 N. E. 767; *Henshaw v. Root*, 60 Ind. 220; *Gregg v. George*, 16 Kan. 546; *Morrison v. McCartney*, 30 Mo. 183; *Cogswell v. Rockingham Ten Cents Savings Bank*, 59 N. H. 43; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425; *Id.*, 7 Hill (N. Y.) 359; *Cowing v. Altman*, 79 N. Y. 167; *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717; *Stewart v. Smith*, 17 Ohio St. 82; *Bell v. Alexander*, 62 Va. 6; *Kinyon v. Stanton*, 44 Wis. 479, 28 Am. Rep. 601. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

⁶⁰ See Negotiable Instruments Law, § 186.

fails to present the check within a reasonable time, and the bank meanwhile becomes insolvent, so that the drawer loses the amount which he had on deposit to meet the check, the loss will fall on the holder, and the drawer will be discharged. If the bank should pay the drawer 50 cents on the dollar, so that he would lose only half the amount on deposit, he would be discharged only as to the amount lost.⁶¹ If he had no money on deposit to meet the check,⁶² or had withdrawn his deposit before presentment,⁶³ even if the presentment had been unreasonably delayed, he would suffer no loss, and would not be discharged by the delay at all. And if the bank should fail, when there had then been no unreasonable delay in presentment, the loss would fall on the drawer, and he would not be discharged.⁶⁴

Reasonable Time

The general rule in determining what is a reasonable time is that regard is to be had to the nature of the instrument, the usages of trade or business, if any, with respect to such instruments, and the facts of the particular case.⁶⁵ So far as concerns checks, however, the following rules have become established: (1) In the absence of special circumstances, where the person to whom the check is issued and the bank are in the same place, the time for presentment is limited to the next business day after the check is received;⁶⁶ and (2) where the

⁶¹ *Murphy v. Levy*, 23 Misc. Rep. 147, 50 N. Y. Supp. 682. See, also, *Williams v. Brown*, 80 App. Div. 628, 80 N. Y. Supp. 247 (settlement by bank in full). See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 407; *Cent. Dig.* §§ 1110-1112.

⁶² *First Nat. Bank v. Linn County Bank*, 30 Or. 296, 47 Pac. 614. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 407; *Cent. Dig.* §§ 1110-1112.

⁶³ *Post*, p. 117.

⁶⁴ *Haggerty v. Baldwin*, 131 Mich. 187, 91 N. W. 150. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 404, 407; *Cent. Dig.* §§ 1091-1103, 1110-1112.

⁶⁵ See *Negotiable Instruments Law*, § 193.

⁶⁶ *Alexander v. Burchfield*, 7 Man. & G. 1061; *Farwell v. Curtis*, 7 Biss. 165, Fed. Cas. No. 4,690; *Industrial Trust, Title & Savings*

bank is at another place than the place where the check is received, it must be forwarded by mail or other usual means of transmission on the next business day after its receipt to the place where the bank is located, and there presented on the next day after its receipt at that place.⁶⁷ These rules apply under ordinary circumstances. There may be circumstances under which a greater delay would not be deemed unreasonable.⁶⁸ For example, forwarding on the next day after receipt would be excused if the only mail was at an unreasonably early hour.⁶⁹ Where the bank is at a distant place, and

Co. v. Weakley, 103 Ala. 458, 15 South. 854, 49 Am. St. Rep. 45; Burns v. Yocum, 81 Ark. 127, 98 S. W. 956; Bickford v. First Nat. Bank of Chicago, 42 Ill. 238, 89 Am. Dec. 436; Holmes v. Roe, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; Anderson v. Gill, 79 Md. 312, 29 Atl. 527, 25 L. R. A. 200, 47 Am. St. Rep. 402; Gordon v. Levine, 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565 (under Negotiable Instruments Law); Furber v. Dane, 203 Mass. 108, 89 N. E. 227; Hamilton v. Winona Salt & Lumber Co., 95 Mich. 436, 54 N. W. 903; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; First Nat. Bank of Charlotte v. Alexander, 84 N. C. 30, 39 Am. Rep. 702; School District No. 57 of Logan County v. Eager, 19 Okl. 235, 91 Pac. 847; Matlock v. Scheuerman, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747; National State Bank v. Weil, 141 Pa. 457, 21 Atl. 661; Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 404, 407; *Cent. Dig.* §§ 1091-1103, 1110-1112.

⁶⁷ Hare v. Henty, 30 L. J. C. P. 302; Prideaux v. Criddle, L. R. 4 Q. B. 455; Heywood v. Pickering, L. R. 9 Q. B. 428; Northwestern Coal Co. v. Bowman, 69 Iowa, 150, 28 N. W. 496; Smith v. Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527. See, also, cases, note 66, supra, and note 70, post. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 404, 407; *Cent. Dig.* §§ 1091-1103, 1110-1112.

⁶⁸ Firth v. Brooks, 4 Law T. N. S. 467; Freiberg v. Cody, 55 Mich. 108, 20 N. W. 813; Holmes v. Roe, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844 (assent of drawer); Cox v. Boone, 8 W. Va. 500, 23 Am. Rep. 627. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

⁶⁹ Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

the check is sent on the next day after its receipt, but in a roundabout way, so that it is presented on a day later than it would have been if sent direct, this, it is generally held, is unreasonable delay, as where the check is deposited for collection in the holder's bank, which forwards it through a correspondent in another place.⁷⁰ But, provided the check is presented not later than had it been sent direct on the day after its receipt, the fact that it followed a roundabout course is immaterial.⁷¹

Checks drawn by banks on banks in other places, commonly called "bank drafts," as distinguished from mere local checks, are often issued for future use, and in such cases, in determining what is a reasonable time for presentment, having regard to the nature of the instrument and the facts of the particular case, presentment may be within a reasonable time, although the check was not sent immediately for presentment.⁷²

⁷⁰ *Moule v. Brown*, 4 Bing. N. C. 266; *Watt v. Gans*, 114 Ala. 264, 21 South. 1011, 69 Am. St. Rep. 99; *Pelt v. Marlur* (Ark.) 128 S. W. 554; *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499; *Id.*, 43 Neb. 791, 62 N. W. 195; *Williams v. Brown*, 53 App. Div. 486, 65 N. Y. Supp. 1049; *Gregg v. Beane*, 69 Vt. 22, 37 Atl. 248; *Gifford v. Hardell*, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925.

In *Plover Savings Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476, it was held sufficient diligence to hold an indorser if the check was forwarded through various banks for collection in accordance with the regular usage of business, although presentment might have been more prompt had a direct course been taken. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

⁷¹ *First Nat. Bank of Grafton v. Buckhannon Bank*, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

⁷² *West Branch State Bank v. Haines*, 135 Iowa, 313, 112 N. W. 552; *Angaletos v. Meridian Nat. Bank*, 4 Ind. App. 573, 31 N. E. 368; *Marbourg v. Brinkman*, 23 Mo. App. 511; *Nutting v. Burked*, 48 Mich. 241, 12 N. W. 184; *National Newark Banking Co. v. Second Nat. Bank of Erie*, 63 Pa. 404. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

Whether the limit of reasonable time may be extended for a day by presentment through the clearing house is a question on which the cases conflict. According to business usages to-day, a man deposits in his own bank for collection all checks drawn on other banks, and these checks, if upon other banks in the same place, are presented on the day after their deposit through the clearing house, with the result that, if a check is received too late to be deposited on the day of its receipt, it is not deposited until the next day, and consequently is not presented until the second day after its receipt. It has been held in some jurisdictions that such presentment is not within a reasonable time;⁷³ but in others, having due regard for business usage, it is properly held that such presentment is within the rule of reasonable diligence.⁷⁴

Since a check must be presented within a reasonable time after its issue, the time will not be extended by its transfer to successive holders.⁷⁵ This is true, also, under the Negotiable Instruments Law,⁷⁶ although thereunder the time for presentment is extended by the transfer of the check as against an indorser.⁷⁷

While the drawer of a check is not discharged by unreasonable delay in presentment, unless he be prejudiced, it is un-

⁷³ *Edmisten v. Henry Herpolsheimer Co.*, 66 Neb. 94, 92 N. W. 133, 59 L. R. A. 934. See, also, *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; *Rosenblatt v. Haberman*, 8 Mo. App. 486. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

⁷⁴ *Zaloom v. Ganim*, 72 Misc. Rep. 36, 120 N. Y. Supp. 85; *Loux v. Fox*, 171 Pa. 68, 33 Atl. 190; *Willis v. Finley*, 173 Pa. 28, 34 Atl. 213. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

⁷⁵ *Davis v. Benton*, 2 Ohio Dec. 329. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

⁷⁶ *Gordon v. Levine*, 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565; *Dehoust v. Lewis*, 128 App. Div. 131, 112 N. Y. Supp. 559. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

⁷⁷ *Post*, p. 123.

safe to delay presentment, not merely because loss may thus discharge the drawer, but because a check which has been long outstanding is looked upon with suspicion, for checks are not intended to remain long in circulation.⁷⁸ The fact that a check is stale when presented is sufficient, it seems, to put the bank on inquiry, so that, if it pays it without inquiry, it does so at its peril in case the drawer has any defense which he could assert against the holder.⁷⁹ The holder thus takes the risk of a refusal by the bank to honor the check.

Presentment—How Made

Presentment should be made at the bank during business hours by some person or holder authorized to receive payment in his behalf.⁸⁰ It has been held in some cases, however, that presentment may be sufficient if the check is mailed by a collecting bank directly to the drawee, and that the indorsers, and a fortiori the drawer, are not discharged by the fact that presentment is made in that way, if they are not thereby prejudiced.⁸¹ In some cases such presentment has been held sufficient on the ground of an established usage among banks.⁸² In some cases such presentment is said to be justified, where there is no other bank in good standing in the place by which

⁷⁸ Post, p. 126.

⁷⁹ Post, p. 151.

⁸⁰ Negotiable Instruments Law, § 72. See, also, Negotiable Instruments Law, §§ 73-75.

⁸¹ Plover Savings Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29; Citizens' Bank of Pleasantville v. First Nat. Bank of Pleasantville, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303. See "*Bills and Notes*," Dec. Dig. (Key No.) § 405; Cent. Dig. §§ 1064-1070.

⁸² Kershaw v. Ladd, 34 Or. 375, 56 Pac. 402, 44 L. R. A. 236. See, also, Bailey v. Bodenham, 16 C. B. N. S. 288; Prideaux v. Criddle, L. R. 4 Q. B. 455; Heywood v. Pickering, L. R. 9 Q. B. 428; Farmers' Bank & Trust Co. of Stanford v. Newland, 97 Ky. 464, 31 S. W. 38.

In the absence of instructions, or of evidence of usage, where there was another public agent for collection in the town, such presentment was insufficient. R. H. Herron Co. v. Mawby, 5 Cal. App. 39, 89 Pac. 872. See "*Bills and Notes*," Dec. Dig. (Key No.) § 405; Cent. Dig. §§ 1064-1070.

presentment might be made.⁸³ By sending the check direct to the drawee, the holder makes that bank his agent, and must, as against the drawer and indorsers, suffer any loss resulting from failure to present in the regular manner.⁸⁴ If the bank refuses to honor the check, it is its duty as the agent of the holder to give notice of dishonor.⁸⁵ As between the holder and a collecting bank, in the absence of an agreement or usage authorizing it to mail the check to the drawee, the bank is negligent if it does so, and is responsible for any loss resulting thereby.⁸⁶

Notice of Dishonor—Protest

In like manner, contrary to the rule governing bills of exchange, the drawer of a check is not discharged by the delay of the holder in giving him notice of dishonor,⁸⁷ or even by his failure to give notice,⁸⁸ unless the drawer has been prej-

⁸³ See *Nidig v. National Bank of Brooklyn*, 59 How. Prac. (N. Y.) 10; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 69 N. W. 765, 61 Am. St. Rep. 550. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 405; *Cent. Dig.* §§ 1064-1070.

⁸⁴ *Farwell v. Curtis*, 7 Biss. 160, Fed. Cas. No. 4,690; *Anderson v. Rodgers*, 53 Kan. 543, 36 Pac. 1067, 27 L. R. A. 248; *Wagner v. Crook*, 167 Pa. 259, 31 Atl. 576, 46 Am. St. Rep. 672.

If no degree of diligence would have resulted in payment, the laches, if any, of the payee in sending the check to the drawee, is no defense in an action against the drawer. *Lowenstein v. Bresler*, 109 Ala. 326, 19 South. 860. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 405; *Cent. Dig.* §§ 1064-1070.

⁸⁵ *Ripley Nat. Bank v. Latimer*, 64 Mo. App. 321; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 69 N. W. 765, 61 Am. St. Rep. 550. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 405; *Cent. Dig.* §§ 1064-1070.

⁸⁶ Post, p. 195.

⁸⁷ *Allen v. Kramer*, 2 Ill. App. 205; *Gregg v. George*, 16 Kan. 546. See *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 69 N. W. 765, 61 Am. St. Rep. 550. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 412, 416; *Cent. Dig.* §§ 1141, 1164-1177.

⁸⁸ *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 607, 19 L. Ed. 1008; *Williams v. Braun*, 14 Cal. App. 396, 112 Pac. 465; *Law-*

udiced thereby. He is at most entitled only to such presentment and notices as will save him from loss. Notice should be given, however, within a reasonable time,⁸⁹ so as to enable the drawer to take steps to protect himself. If such notice is not given, and he is prejudiced, he will be discharged to the extent of the loss caused by the delay or failure.⁹⁰

The Negotiable Instruments Law, while it provides that the failure to present a check for payment within a reasonable time will discharge the drawer only to the extent of the loss caused thereby,⁹¹ fails, apparently by an oversight, to provide expressly for the effect of failure to give due notice of dishonor when the check has been presented and not paid. The result of this omission appears to be that the liability of the drawer, under that law, is governed by the general provision that, "when a negotiable instrument has been dishonored by * * * nonpayment, notice of dishonor must be given to the drawer, * * * and any drawer * * * to whom such notice is not given is discharged."⁹²

Protest, at least when the check is not in the form of a

rence v. Schmidt, 35 Ill. 440, 85 Am. Dec. 371; Offutt v. Rucker, 2 Ind. App. 350, 27 N. E. 589; Lester v. Given, 8 Bush (Ky.) 357; Exchange Bank of Wheeling v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Spink & Keyes Drug Co. v. Ryan Drug Co., 72 Minn. 178, 75 N. W. 18, 71 Am. St. Rep. 477; Stewart v. Smith, 17 Ohio St. 85; post, p. 118. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 416; *Cent. Dig.* §§ 1164-1177.

⁸⁹ For provisions governing notice, see Negotiable Instruments Law, §§ 89-108.

⁹⁰ Henshaw v. Root, 60 Ind. 220; Pack v. Thomas, 21 Miss. 11, 51 Am. Dec. 135; See, also, cases supra, notes 87, 88. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1194, 1195.

⁹¹ Negotiable Instruments Law, § 186.

⁹² Negotiable Instruments Law, § 89. Cf. § 185. See Cassel v. Regierer (Sup.) 114 N. Y. Supp. 601; Kuflick v. Glasser (Sup.) 114 N. Y. Supp. 870. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 395; *Cent. Dig.* §§ 996-1021.

foreign bill of exchange, is unnecessary;⁹³ but in most jurisdictions, by statute, protest is permissible.⁹⁴

Excuses for Failure to Present and Give Notice

The circumstances which will excuse the holder of a check for failure to present it for payment, or for delay in presentment, are in general the same as those which excuse like failure to present a bill of exchange. Presentment is dispensed with where after the exercise of reasonable diligence it cannot be made,⁹⁵ and where presentment is waived.⁹⁶ Delay is excused where it is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence,⁹⁷ and, where the cause of delay ceases to operate, presentment must be made with reasonable diligence.⁹⁸ Presentment is not required to charge the drawer, where he had no right to expect or require that the drawee would pay

⁹³ *Wittich v. First Nat. Bank of Pensacola*, 20 Fla. 843, 51 Am. Rep. 631; *Henshaw v. Root*, 60 Ind. 220; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. 239. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 394, 395; *Cent. Dig.* §§ 996-1050.

⁹⁴ *Moses v. President, etc., of Franklin Bank of Baltimore*, 34 Md. 574; *Wisner v. First Nat. Bank of Gallitzin*, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266; *Negotiable Instruments Law*, § 118. For provisions in respect to protest, see sections 152-160. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 395; *Cent. Dig.* §§ 996-1021.

⁹⁵ *Negotiable Instruments Law*, § 82. See *Purcell v. Allemon*, 63 Va. 739. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 397, 417; *Cent. Dig.* §§ 1029-1044, 1188-1193.

⁹⁶ *Negotiable Instruments Law*, § 82. See *Pollard v. Bowen*, 57 Ind. 232; *Emery v. Hobson*, 62 Me. 578, 16 Am. Rep. 513 (indorser); *Compton v. Gilman*, 19 W. Va. 312, 42 Am. Rep. 776; ante, p. 100. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 422; *Cent. Dig.* §§ 1196-1208.

⁹⁷ *Simonds v. Black River Ins. Co.*, Fed. Cas. No. 12,874 (delay due to postal service); *First Nat. Bank of Belle Plaine v. McConnell*, 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. Rep. 336 (loss of check). See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 417; *Cent. Dig.* §§ 1188-1193.

⁹⁸ *Negotiable Instruments Law*, § 81.

the instrument,⁹⁹ as where he drew without sufficient funds,¹⁰⁰ unless he has, notwithstanding, reasonable grounds to believe it will be paid,¹⁰¹ or withdrew the funds before presentment.¹⁰² Presentment is excused by the removal of the drawee bank, and by the bankruptcy and suspension.¹⁰³ Notice of the existence of these circumstances should be given to the drawer, if known to him, as soon as possible or practicable, or the excuse will not avail.¹⁰⁴

The circumstances which will excuse the holder of a check for failure to give notice of dishonor, or for delay therein, where notice is required, are substantially the same as excuse the holder of a bill of exchange.¹⁰⁵

Presentment and Notice Before Suit

Although delay in presentment does not discharge the drawer, except so far as he is thereby prejudiced, presentment, unless excused, is ordinarily necessary to give the holder a

⁹⁹ Negotiable Instruments Law, § 79.

¹⁰⁰ Hoyt v. Seeley, 18 Conn. 353; Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 S. E. 212; Thom v. Sinsheimer, 66 Ill. App. 555; Beauregard v. Knowlton, 156 Mass. 395, 31 N. E. 389; Pack v. Thomas, 21 Miss. 11, 51 Am. Dec. 135. See, also, Carson, Pirie, Scott & Co. v. Fincher, 138 Mich. 666, 101 N. W. 844. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 397; *Cent. Dig.* §§ 1029-1044.

¹⁰¹ Mackall v. Goszler, 2 Cranch, C. C. 240, Fed. Cas. No. 8,835; Hamlin v. Simpson, 105 Iowa, 125, 74 N. W. 906, 44 L. R. A. 397. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 397; *Cent. Dig.* §§ 1029-1044.

¹⁰² Armstrong v. Brolaski (C. C.) 46 Fed. 903; Culver v. Marks, 122 Ind. 554, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377; Emery v. Hobson, 63 Me. 33; Conory v. Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156. Cf. Sutcliffe v. McDowell, 2 Nott & McC. (S. C.) 251. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 397; *Cent. Dig.* §§ 1029-1044.

¹⁰³ See Purcell v. Allemong, 63 Va. 739. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 397; *Cent. Dig.* §§ 1029-1044.

¹⁰⁴ See Purcell v. Allemong, 63 Va. 739. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 397; *Cent. Dig.* §§ 1029-1044.

¹⁰⁵ See Negotiable Instruments Law, §§ 109-115.

cause of action against the drawer; his undertaking being to pay the check if on presentment it be dishonored.¹⁰⁶ Such presentment may be made, however, at any time before suit,¹⁰⁷ provided that it be not so long delayed that the action has not become barred by the statute of limitations.¹⁰⁸

It has been held, also, that the giving of notice of dishonor, unless excused, is a prerequisite to suit.¹⁰⁹ On the other hand, it has been held that notice of dishonor is not necessary to enable the holder to maintain an action against the drawer, if he has not suffered loss by reason of failure.¹¹⁰

Statute of Limitations

Since presentment is necessary to give the holder a cause of action against the drawer, it has been held that the statute of limitations does not begin to run until presentment and dis-

¹⁰⁶ *Kelley v. Brown*, 5 Gray (Mass.) 108; *Spink & Keyes Drug Co. v. Ryan Drug Co.*, 72 Minn. 178, 75 N. W. 18, 71 Am. St. Rep. 477; *Harker v. Anderson*, 21 Wend. (N. Y.) 372; *Ross v. Saron* (Sup.) 93 N. Y. Supp. 553; *Commercial Nat. Bank of Charlotte v. First Nat. Bank*, 118 N. C. 783, 24 S. E. 524, 32 L. R. A. 712, 54 Am. St. Rep. 753; *Penn Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. 134, 28 Atl. 1077; *Compton v. Gilman*, 19 W. Va. 312, 42 Am. Rep. 776. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 394-398, 445; *Cent. Dig.* §§ 996-1050.

¹⁰⁷ *Church v. Farnham*, 1 Sheld. (N. Y.) 393. See cases in preceding note. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 394-398; *Cent. Dig.* §§ 996-1050.

¹⁰⁸ *Brust v. Barrett*, 16 Hun (N. Y.) 409. See "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 66; *Cent. Dig.* § 366.

¹⁰⁹ *Sherman v. Comstock*, 2 McLean, 19, Fed. Cas. No. 12,764; *Dowling v. Hunt*, 2 Ariz. 8, 7 Pac. 496; *Minturn v. Fisher*, 4 Cal. 35; *Pollard v. Bowen*, 57 Ind. 232; *Shultz v. Depuy*, 3 Abb. Prac. (N. Y.) 252; *Goodwin v. Cobe*, 24 Misc. Rep. 389, 53 N. Y. Supp. 415; *Compton v. Gilman*, 19 W. Va. 312, 42 Am. Rep. 776; *Dolph v. Rice*, 18 Wis. 397, 86 Am. Dec. 778. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 395; *Cent. Dig.* §§ 996-1021.

¹¹⁰ *Industrial Bank of Chicago v. Bowes*, 165 Ill. 70, 46 N. E. 10, 56 Am. St. Rep. 228; *Spink & Keyes Drug Co. v. Ryan Drug Co.*, 72 Minn. 178, 75 N. W. 18, 71 Am. St. Rep. 477. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 394-398; *Cent. Dig.* §§ 996-1050.

honor;¹¹¹ unless under the circumstances presentment is unnecessary, as where the check is not drawn against funds, in which case the statute begins to run from the issue.¹¹² It has been held, however, that the presentment must be made at least within the statutory period of limitation, and that if delayed beyond that time the action is barred.¹¹³

NEGOTIABILITY AND TRANSFER

34. IN GENERAL—A check payable to order is negotiable by indorsement, and if payable to bearer is negotiable by delivery, with the same effect upon the rights of the parties to the instrument (except as explained in sections 32, 33, 35, and 36) as in the case of a demand bill of exchange.

35. LIABILITY OF INDORSER—Every indorser of a check who indorses without qualification incurs the liability of an indorser of a demand bill of exchange; that is, he engages that on due presentment to the drawee for payment it will be paid, and that if dishonored, and due notice of dishonor be given to him, he will pay the amount to the hold-

¹¹¹ Wright v. MacCarty, 92 Ill. App. 120. See "*Limitation of Actions*," Dec. Dig. (Key No.) § 66; Cent. Dig. § 366.

¹¹² Brush v. Barrett, 82 N. Y. 400, 37 Am. Rep. 569. See "*Limitation of Actions*," Dec. Dig. (Key No.) § 66; Cent. Dig. § 366.

¹¹³ Brust v. Barrett, 16 Hun (N. Y.) 409.

The statute begins to run at latest after the lapse of a reasonable time for presentment, and a delay beyond the period of limitation would be a bar. Scroggin v. McClelland, 37 Neb. 644, 36 N. W. 208, 22 L. R. A. 110, 40 Am. St. Rep. 520; Wrigley v. Farmers' & Merchants' State Bank, 76 Neb. 862, 108 N. W. 132.

In jurisdictions where the Negotiable Instruments Law has been enacted, it seems that the drawer is discharged by his laches in giving notice of dishonor, although he suffered no loss thereby. Ante, p. 115. See "*Limitation of Actions*," Dec. Dig. (Key No.) § 66; Cent. Dig. § 366.

er, or to any subsequent indorser who may be compelled to pay it. The check must be presented within a reasonable time after his indorsement (or, in states which have enacted the Negotiable Instruments Law, after the last negotiation of the check), or the indorser will be discharged from liability thereon whether he has suffered loss by the delay or not. What is a reasonable time after the indorsement (or last negotiation) is determined by the rules which determine what is a reasonable time after its issue within which to present a check in order to charge the drawer. Such indorser also makes the same warranties as such indorser of other negotiable instruments.

36. **HOLDER IN DUE COURSE**—A holder in due course—that is, one who has taken a check by negotiation in good faith and for value, before it was overdue, and without notice that it had been previously dishonored, or of any infirmity in the instrument or defect in the title of the person negotiating it—holds the check free from any such defect and free from personal defenses available to prior parties among themselves, and may enforce payment against all parties liable thereon. A check is deemed overdue if negotiated an unreasonable time after its issue. What is an unreasonable time for this purpose is a question of fact, depending upon the special circumstances of each case.

In General

A check, if payable to order or to bearer, is a negotiable instrument; ¹¹⁴ and, like other negotiable instruments, it is ne-

¹¹⁴ Keene v. Beard, 8 C. B. (N. S.) 372; Barbour v. Bayon, 5 La. Ann. 304, 52 Am. Dec. 593; Bill v. Stewart, 156 Mass. 308, 31 N. E. 386; Symonds v. Riley, 188 Mass. 470, 74 N. E. 926; Gates City Building & Loan Ass'n v. National Bank of Commerce, 126 Mo. 82, 23

gotiated by indorsement or delivery, according as it is payable to order or to bearer. The rights of the transferee of a check by negotiation do not differ from those of a transferee of a demand bill of exchange, except in so far as different rules prevail in respect to his duty to make presentment and to give notice of dishonor in order to charge the drawer,¹¹⁵ in respect to the time after the indorsement within which presentment must be made in order to charge indorsers,¹¹⁶ and in respect to the time after the issue of the check when it will be deemed overdue, so as to charge the transferee with notice of defense.¹¹⁷

Liability of Indorser

A check, like any other negotiable instrument, may be indorsed, not merely so as to transfer it, but so as to impose upon the indorser the ordinary liabilities which flow from the indorsement of a negotiable instrument. This is so, even if the check be payable to bearer and transferable by mere delivery, if the holder desires thereby to give to the transferee the added security of his name and liability on the instrument. It follows that the indorser of a check who indorses without qualification engages to pay the amount thereof to the holder, if upon due presentment it be dishonored and the necessary proceedings on dishonor be duly taken.¹¹⁸

The indorser also by his indorsement impliedly makes the usual warranties that arise from such an indorsement of other negotiable instruments; that is, as declared by the Negotiable Instruments Law,¹¹⁹ he warrants to all subsequent holders in

S. W. 633, 27 L. R. A. 401, 47 Am. St. Rep. 633. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 149; *Cent. Dig.* § 373.

¹¹⁵ Ante, p. 107.

¹¹⁶ Post, p. 122.

¹¹⁷ Post, p. 126.

¹¹⁸ *Keene v. Beard*, 8 C. B. (N. S.) 372; Negotiable Instruments Law, § 65. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 280; *Cent. Dig.* §§ 622-637.

¹¹⁹ Negotiable Instruments Law, § 66.

As to warranties of indorser without recourse and of transferror by delivery, see section 65.

due course that (1) the check is genuine;¹²⁰ (2) that he has good title to it;¹²¹ (3) that all prior parties had capacity to contract; and (4) that it is valid and subsisting.¹²² A so-called indorsement which is made upon payment by the drawee is to be distinguished from an indorsement in its technical sense. The effect of such an indorsement will be considered later.¹²³

Presentment and Notice of Dishonor

The liability of the drawer of a check differs from that of the drawer of a bill of exchange, in that he is not discharged by delay in presentment or in giving notice of dishonor unless he was prejudiced thereby.¹²⁴ The liability of the indorser of a check, however, does not differ in this respect from that of the indorser of a demand bill of exchange. A check, being payable on demand, must, in order to charge an indorser, be presented for payment within a reasonable time, and unless so presented, and notice of dishonor be given, he is discharged, irrespective of any resulting loss to the indorser.¹²⁵

¹²⁰ Warren-Sharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181, 38 C. C. A. 108; Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523. See "*Bills and Notes*," Dec. Dig. (Key No.) § 296; Cent. Dig. §§ 667-679.

¹²¹ Wellington Nat. Bank v. Robbins, 71 Kan. 748, 81 Pac. 487, 114 Am. St. Rep. 523; Lieber v. Fourth Nat. Bank of St. Louis, 137 Mo. App. 158, 117 S. W. 672. See "*Bills and Notes*," Dec. Dig. (Key No.) § 296; Cent. Dig. §§ 667-679.

¹²² Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 South. 440, 49 Am. St. Rep. 17. See "*Bills and Notes*," Dec. Dig. (Key No.) § 296; Cent. Dig. §§ 667-679.

¹²³ Post, p. 163.

¹²⁴ Ante, p. 107.

¹²⁵ Comer v. Dufour, 95 Ga. 376, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89; Travers v. T. M. Sinclair & Co., 122 Ill. App. 203; Northwestern Coal Co. v. Bowman, 69 Iowa, 150, 28 N. W. 497 (cf. Fritz v. Kennedy, 119 Iowa, 628, 93 N. W. 603); First Nat. Bank of Detroit v. Currie, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537; Parker v. Reddick, 65 Miss. 242, 3 South. 575, 7 Am. St. Rep. 646; First Nat. Bank of Wymore v. Miller, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499 (but see State Bank of Goth-

In determining what is a reasonable time within which to present a check, so as to charge an indorser, the same rules prevail as those which determine the time with respect to the drawer; that is, as has already been more fully stated,¹²⁶ in the absence of special circumstances, where the indorsee and the bank are in the same place, the check must be presented not later than the day after it has been received; ¹²⁷ and where the indorsee and the bank are in different places the check must be forwarded, not later than the next day after the check has been received, to the place where the bank is located, and there presented not later than the day after its receipt at that place.¹²⁸ An ordinary check is intended for payment, and not for indefinite circulation, from which it follows on principle that the time for presentment, as against an indorser, runs from the time of delivery of the check to the indorsee, and such is the rule where it has not been changed by statute.¹²⁹ A dif-

enburgh v. Carroll, 81 Neb. 484, 116 N. W. 276); Smith v. Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; Cuminsky v. Kleiner, 34 Misc. Rep. 181, 68 N. Y. Supp. 776; Start v. Tupper, 81 Vt. 19, 69 Atl. 151, 15 L. R. A. (N. S.) 213, 130 Am. St. Rep. 1015; Kirkpatrick v. Puryear, 93 Tenn. 409, 28 S. W. 1130, 22 L. R. A. 785. See "*Bills and Notes*," Dec. Dig. (Key No.) §§ 404, 407; Cent. Dig. §§ 1091-1103, 1110-1112.

¹²⁶ Ante, p. 109.

¹²⁷ Brown v. Schintz, 202 Ill. 509, 67 N. E. 172; First Nat. Bank of Detroit v. Currie, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537. See "*Bills and Notes*," Dec. Dig. (Key No.) § 404; Cent. Dig. §§ 1091-1103.

¹²⁸ Northwestern Coal Co. v. Bowman, 69 Iowa, 150, 28 N. W. 496; Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925; Parker v. Reddick, 65 Miss. 242, 3 South. 575, 7 Am. St. Rep. 646; Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925. See "*Bills and Notes*," Dec. Dig. (Key No.) § 404; Cent. Dig. §§ 1091-1103.

¹²⁹ Northwestern Coal Co. v. Bowman, 69 Iowa, 150, 28 N. W. 496 (cf. Plover Savings Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29; post, note 132); First Nat. Bank of Detroit v. Currie, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537; Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925 (cf. Co-

ferent rule, however, appears to be established by the Negotiable Instruments Law, which provides that "where the instrument * * * is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if it be made within a reasonable time after the last negotiation thereof."¹³⁰ It is to be borne in mind that the rule here made applicable to a bill of exchange applies to a check.¹³¹ It has been held accordingly, under the Negotiable Instruments Law, that in determining what is a reasonable time within which to present a check in order to charge the indorsers, only the time between the last negotiation and the presentment need be considered.¹³² The effect of this appears to be to continue the liability of an indorser of a check for an indefinite time, limited only by the statute of limitations, provided that the check is presented for payment within a reasonable time after its last negotiation, no matter how long this may be after the drawing or indorsement.¹³³ The circumstances which will excuse the holder of a check for failure to present it,¹³⁴ or for

Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451; post, note 132). See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

¹³⁰ Negotiable Instruments Law, § 71.

¹³¹ Negotiable Instruments Law, § 185.

¹³² Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451 (bank check). See, also, Plover Savings Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476. Cf. Gordon v. Levine, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 404; *Cent. Dig.* §§ 1091-1103.

¹³³ This unfortunate result, observes Professor Brannan, might have been avoided by adopting the corresponding provision of the English Bills of Exchange Act, under which the drawer of a bill payable on demand is discharged unless presentment be made within a reasonable time after its issue, and the indorser unless it is presented within a reasonable time after his indorsement. Brannan, *Neg. Inst. Law*, p. 224.

¹³⁴ See Negotiable Instruments Law, §§ 80, 82.

delay in presentment,¹³⁵ or for failure to give¹³⁶ or delay in giving¹³⁷ notice of dishonor, are substantially the same as those which excuse like delay or failure in respect to a bill, of exchange.¹³⁸

Holder in Due Course

As in the case of other negotiable instruments, one to whom a check is negotiated for value and in good faith before it is overdue takes it free from personal defenses available to prior parties of which he was without notice.¹³⁹ The transfer must be for value.¹⁴⁰ Of course, one who receives a check from one who was himself a holder in due course has all the rights of such former holder, although the circumstances under which he receives the check are not such as would otherwise constitute the receiver a holder in due course.¹⁴¹

¹³⁵ See Negotiable Instruments Law, § 81.

¹³⁶ See Negotiable Instruments Law, §§ 109-112, 115.

¹³⁷ See Negotiable Instruments Law, § 113.

¹³⁸ See, ante, p. 116.

¹³⁹ *Bill v. Stewart*, 156 Mass. 508, 31 N. E. 386; *Symonds v. Riley*, 188 Mass. 470, 74 N. E. 926; *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923; *Gate City Building & Loan Ass'n v. National Bank of Commerce*, 126 Mo. 82, 28 S. W. 633, 27 L. R. A. 401, 47 Am. St. Rep. 633; *Jacks v. Darrin*, 3 E. D. Smith (N. Y.) 557; *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747; *Capital Savings Bank & Trust Co. v. Montpelier Savings Bank & Trust Co.*, 77 Vt. 189, 59 Atl. 827.

A holder in due course of a lost or stolen check acquires good title. *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655. See, also, *Poess v. Twelfth Ward Bank of City of New York*, 43 Misc. Rep. 45, 86 N. Y. Supp. 857; Negotiable Instruments Law, §§ 52-59; cases post, notes 143-146. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 365; *Cent. Dig.* §§ 944-959.

¹⁴⁰ *Shawmut Nat. Bank v. Manson*, 168 Mass. 425, 47 N. E. 196; *Citizens' State Bank v. Cowles*, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765. See Negotiable Instruments Law, § 54; ante, p. 41. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 353; *Cent. Dig.* §§ 898-908.

¹⁴¹ *Symonds v. Riley*, 188 Mass. 470, 74 N. E. 926. See Negotiable Instruments Law, § 58. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 362; *Cent. Dig.* §§ 937-943.

Stale Check

When a check is to be deemed overdue or "stale," so as to let in defenses against the transferee, is a question in respect to which the courts have not generally laid down any very definite rule, other than that a check will be deemed "stale" after the expiration of a reasonable time. Logically, perhaps, this would mean such time as is reasonably necessary for the check to reach the drawee bank. This would practically mean, however, that checks should not circulate at all. Checks, "although payable on demand, are not treated as being dishonored or overdue on the day, or immediately after the day, of their date. A holder, who takes a check in good faith and for value several days after it is drawn, receives it without being subject to defenses of which he has no notice before or at the time his title accrues. This is the rule as settled by uniform practice and the current decisions in the courts of the United States."¹⁴² Thus checks have been held not stale when only a few days old,¹⁴³ and stale when a year or more¹⁴⁴ or a few months old,¹⁴⁵ or even less.¹⁴⁶ On the whole, the rule appears to be that a check is stale after the lapse of a reasonable time from its issue, and that what is a reasonable

¹⁴² Ames v. Meriam, 98 Mass. 294. See "*Bills and Notes*," Dec. Dig. (Key No.) § 348; Cent. Dig. §§ 870-877½.

¹⁴³ Rothschild v. Corney, 9 B. & C. 388 (6 days); Himmelmann v. Hotelling, 40 Cal. 111, 6 Am. Rep. 600; Lester v. Given, 8 Bush (Ky.) 357; First Nat. Bank of Rochester v. Harris, 108 Mass. 514; Estes v. Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, 50 Am. St. Rep. 424 (6 days); Fealey v. Bull, 163 N. Y. 397, 57 N. E. 631 (5 days); Davis v. Dayton, 7 Misc. Rep. 488, 27 N. Y. Supp. 969. See "*Bills and Notes*," Dec. Dig. (Key No.) § 348; Cent. Dig. §§ 870-877½.

¹⁴⁴ Walden v. Webber, 15 Ky. Law Rep. 846; Skillman v. Titus, 32 N. J. Law, 96; Lancaster Bank v. Woodward, 18 Pa. 361, 57 Am. Dec. 618. See "*Bills and Notes*," Dec. Dig. (Key No.) § 348; Cent. Dig. §§ 870-877½.

¹⁴⁵ First Nat. Bank of Newton v. Needham, 29 Iowa, 249. See "*Bills and Notes*," Dec. Dig. (Key No.) § 348; Cent. Dig. §§ 870-877½.

¹⁴⁶ Vairin v. Hobson, 8 La. 50, 28 Am. Dec. 125. See "*Bills and Notes*," Dec. Dig. (Key No.) § 348; Cent. Dig. §§ 870-877½.

time depends upon the special circumstances of each case. Such appears to be the rule as declared by the Negotiable Instruments Law: "Where an instrument payable on demand is negotiated an unreasonable time after its issue, the holder is not deemed a holder in due course."¹⁴⁷ Since regard is to be had to the nature of the instrument, in determining what is a reasonable time, it seems clear that a bank check drawn on a bank at a distant point may reasonably be outstanding for a longer period than a mere local check without being deemed overdue paper.¹⁴⁸

LIABILITY OF DRAWEE TO HOLDER

37. In accordance with the rule which has prevailed in most jurisdictions, and which is now established in all states which have adopted the Negotiable Instruments Law, a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. But in some jurisdictions the rule has prevailed that if the bank, being in funds, refuses on presentment to pay a check, it is liable thereon to the holder.

By weight of authority, the holder of a check has no right of action against the bank on which it is drawn for refusal to pay it, unless the bank has assumed an obligation to him to pay it by certifying it or accepting it; his only remedy in

¹⁴⁷ Negotiable Instruments Law, § 54. See *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522; *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 348; *Cent. Dig.* §§ 870-877½.

¹⁴⁸ See *Bull v. First Nat. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97 (cf. *La Due v. First Nat. Bank of Kasson*, 31 Minn. 33, 16 N. W. 426). Ante, p. 111. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 348; *Cent. Dig.* §§ 870-877½.

such case being against the drawer, and against the indorsers, if there are any.¹⁴⁹ This results strictly from the nature of the instrument as a bill of exchange; the obligations of all parties to the instrument being based upon a general personal credit, so that, unless the drawee has assented to the order by certifying the check or accepting it, he is not liable on the instrument.¹⁵⁰ It is true that by the implied contract between a bank and its depositor the bank undertakes to pay checks drawn by him to the amount of the deposit, and that for a failure to honor his check, when there are sufficient funds to his credit, the bank is liable to the depositor;¹⁵¹ but this

¹⁴⁹ *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Schroeder v. Central Bank*, 34 Law T. (N. S.) 735; *National Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. Ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; *Florence Mining Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16, 24 Pac. 582; *Georgia Seed Co. v. Talmadge & Co.*, 96 Ga. 254, 22 S. E. 1001; *Harrison v. Wright*, 100 Ind. 515, 58 Am. Rep. 805; *Case v. Henderson*, 23 La. Ann. 49, 8 Am. Rep. 590; *Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Rep. 6; *Moses v. President, etc., of Franklin Bank of Baltimore*, 34 Md. 574; *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. 1119; *Merchants' Nat. Bank v. Coates*, 79 Mo. 168; *Dickinson v. Coates*, 79 Mo. 250, 49 Am. Rep. 228; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. Law, 255, 50 Am. Rep. 417; *Ætna Nat. Bank v. Fourth Nat. Bank of City of New York*, 46 N. Y. 82, 7 Am. Rep. 314; *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55; *First Nat. Bank of Union Mills v. Clark*, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580; *Commercial Nat. Bank of Charlotte v. First Nat. Bank*, 118 N. C. 783, 24 S. E. 524, 32 L. R. A. 712, 54 Am. St. Rep. 753; *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 42 N. E. 701, 31 L. R. A. 653, 56 Am. St. Rep. 700; *Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank of Sharpsburg*, 220 Pa. 1, 69 Atl. 280, 15 L. R. A. (N. S.) 519; *Alkin v. Jones*, 93 Tenn. 353, 27 S. W. 609, 25 L. R. A. 523, 42 Am. St. Rep. 921; *House v. Kountze*, 17 Tex. Civ. App. 402, 43 S. W. 561; *Commercial Bank of Tacoma v. Chilberg*, 14 Wash. 247, 44 Pac. 264, 53 Am. St. Rep. 873. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 140*; *Cent. Dig. §§ 389-397*.

¹⁵⁰ Post, p. 131.

¹⁵¹ Post, p. 143.

contract is between the bank and the depositor, and between the bank and the holder there is no privity of contract.

In some jurisdictions, however, it has been held that if the bank, being in funds, refuses on presentment to honor a check, it is liable thereon to the holder.¹⁵² Generally the doctrine is based on the view that a check operates as an assignment of the funds of the drawer to the amount of the check, an assignment which becomes complete upon presentment, so that if the bank improperly refuses payment the holder may maintain an action against the bank on the check. Since the relation between the bank and its depositor is that of debtor and creditor, the depositor may, of course, assign his claim; but to construe a check as an assignment is to lose sight of its essential nature as a negotiable instrument. A check, like an ordinary bill of exchange, is an unconditional order to pay a sum certain in money, and an order to pay out of a particular fund is not unconditional. An instrument otherwise in the form of a check, which purported to be drawn on funds deposited by the drawer, would, indeed, operate as an assignment. It is sometimes loosely said that a check is distinguish-

¹⁵² *Munn v. Burch*, 25 Ill. 35; *Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids*, 68 Ill. 398; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 49 N. E. 420, 39 L. R. A. 479, 63 Am. St. Rep. 270; *Roberts v. Corbin*, 26 Iowa, 315, 96 Am. Dec. 146; *Bloom v. Winthrop State Bank*, 121 Iowa, 101, 96 N. W. 733; *Commonwealth v. Kentucky Distilleries & Warehouse Co.*, 132 Ky. 521, 116 S. W. 766, 21 L. R. A. (N. S.) 30, 136 Am. St. Rep. 186; *Waggatt v. First Nat. Bank (Minn.)*, 134 N. W. 228; *Columbia Nat. Bank of Lincoln v. German Nat. Bank*, 56 Neb. 803, 77 N. W. 346; *Guthrie Nat. Bank v. Gill*, 6 Okl. 560, 54 Pac. 434; *Fogarties v. President, etc., of State Bank*, 12 Rich. (S. C.) 518, 78 Am. Dec. 468; *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700; *Pease v. Landauer*, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247.

In most of these states, the rule has been changed by the enactment of the Negotiable Instruments Law. Post, p. 130. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 140; *Cent. Dig.* §§ 380-397.

ble from an ordinary bill of exchange, in that it is always drawn on funds deposited with the drawee; but in truth a check does not in terms purport to be so drawn, and a check is not any less a check when not actually drawn upon funds, while an instrument which was in express terms drawn upon funds deposited with the drawee, however sufficient it might be as an assignment, would not be a check. To construe a check as an assignment is, therefore, to deny its existence as a check.¹⁵³

While a check of itself does not operate as an assignment of the drawer's funds in the hands of the drawee, it is competent for the parties to create such an assignment by agreement, oral or otherwise, in addition to the check, that such shall be the effect of the transaction. This is held, even by courts which recognize that a check does not constitute an assignment.¹⁵⁴ In such case it, however, seems that the action lies, not on the check, but on the collateral agreement for an assignment, of which the check may be evidence.¹⁵⁵

Happily this general question has now been settled in most states by the enactment of the Negotiable Instruments Law, which, in accordance with what has been the prevailing rule, provides: "A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."¹⁵⁶

¹⁵³ See 2 Ames, Cas. Bills & Notes, 735; 11 Harv. Law Rev. 548.

¹⁵⁴ *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; *Fortier v. Delgado & Co.*, 122 Fed. 604, 59 C. C. A. 180. See "Assignments," *Dec. Dig. (Key No.)* § 49; *Cent Dig.* § 85-98.

¹⁵⁵ See 11 Harv. Law Rev. 60.

¹⁵⁶ Negotiable Instruments Law, § 189.

CERTIFIED CHECKS

38. **LIABILITY OF BANK**—Where a check is certified to be good by the bank on which it is drawn, the bank assumes an unconditional obligation to the holder to pay it on presentment.
39. **LIABILITY OF DRAWER AND INDORSERS**—Where the holder of a check procures it to be certified, the drawer and all indorsers are discharged from liability thereon; but where the drawer before delivery procures it to be certified, he is not thereby discharged.

Nature and Effect of Certification

Strictly speaking, a check is not presentable for acceptance, but is presentable only for payment. The bank may, however, assume the obligation of paying the amount, if it sees fit, by certifying the check.

Certification is often said to be the equivalent of acceptance, but this is somewhat misleading. Acceptance is the signification by the drawee of his assent to the order of the drawer.¹⁵⁷ While a bill contains in express terms only an order to pay, by the law merchant, if the bill is payable at a future day, or at or after sight, the drawer also orders the drawee to accept the bill upon presentment—that is, to promise to pay it according to the terms of the order;¹⁵⁸ but if the order is to pay on demand, the order does not call for acceptance. By the certification of a check, the drawee does, indeed, promise to pay the amount of the instrument to the holder; but certification is different from mere acceptance, in that it is not an added obligation, but a substituted obligation.¹⁵⁹ This holds true at least where the certification is at the request of the

¹⁵⁷ See Negotiable Instruments Law, § 132.

¹⁵⁸ 2 Ames, Cas. Bills & Notes, 787.

¹⁵⁹ 2 Ames, Cas. Bills & Notes, 801.

holder. The check calls for payment, and not for acceptance, and if the holder sees fit, instead of receiving the money, to take the obligation of the bank for payment at such time as he shall call for it, he thereby discharges the drawer and takes the sole obligation of the drawee.¹⁶⁰ The transaction is in legal effect the same as if the holder surrendered the check, received payment, deposited the money with the bank, and received its certificate of deposit or note payable on demand.¹⁶¹ Upon certification the bank charges the amount to the drawer precisely as if the check were paid, and the drawer loses all control of the fund and cannot stop payment.¹⁶² The obligation of the certifying bank is, therefore, to pay the amount of the instrument to the holder upon demand.¹⁶³

It follows from what has been said that after certification the bank cannot refuse payment to the payee or other bona fide holder, on the ground that the drawer's funds were insufficient.¹⁶⁴ The bank's position is the same as if it had paid the

¹⁶⁰ Post, p. 136.

¹⁶¹ See cases cited post, note 163.

¹⁶² *Willets v. Phoenix Bank*, 2 Duer (N. Y.) 121; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Freund v. Importers' & Traders' Nat. Bank*, 12 Hun, 537; *Id.*, 76 N. Y. 352. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-433.

¹⁶³ *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238, 89 Am. Dec. 436; *Willets v. Phoenix Bank*, 2 Duer (N. Y.) 121; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623; *Id.*, 16 N. Y. 125, 69 Am. Dec. 678; *Meads v. Merchants' Bank of Albany*, 25 N. Y. 143, 82 Am. Dec. 331; *Poess v. Twelfth Ward Bank of City of New York*, 43 Misc. Rep. 45, 86 N. Y. Supp. 837; *Girard Bank v. Bank of Penn Tp.*, 39 Pa. 92, 80 Am. Dec. 507; *Andrews v. German Nat. Bank*, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300.

Certification gives no lien on the assets of the bank. *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-433.

¹⁶⁴ *Espy v. First Nat. Bank*, 18 Wall. 621, 21 L. Ed. 947; *Hayes v. Northern Pac. R. Co.*, 74 Fed. 279, 20 C. C. A. 52; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. 136, 39 L.

check to the holder, in which case it could not, by the weight of authority, recover the amount from him upon the ground that it had paid under a mistake as to the sufficiency of the funds.¹⁶⁵ A different case is presented if the certification was procured by fraud and the check has not passed into the hands of a holder in due course.¹⁶⁶

Upon the ground that certification at the request of the holder discharges the drawer, and substitutes the sole obligation of the bank, thereby operating as payment so far as concerns the drawer, it has been held, also, that the bank cannot resist payment upon a ground which would have been a defense in an action by the payee or a holder standing in his shoes against the drawer, as that the check was procured from the drawer by fraud, although the drawer has notified the bank of his defense and instructed the bank not to pay the check.¹⁶⁷

R. A. 657, 93 Am. St. Rep. 113; *First Nat. Bank v. Union Trust Co.*, 158 Mich. 94, 122 N. W. 547, 133 Am. St. Rep. 362.

In New York the rule appears to have been that the bank may revoke the certification, unless there has been a change of position upon faith thereof. *Irving Bank v. Wetherald*, 36 N. Y. 335; *National Park Bank of New York v. Steele & Johnson Mfg. Co.*, 58 Hun, 81, 11 N. Y. Supp. 538; *Brooklyn Trust Co. v. Toler*, 65 Hun, 187, 19 N. Y. Supp. 975, affirmed 138 N. Y. 675, 34 N. E. 515. See *Negotiable Instruments Law*, § 62. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-433.

¹⁶⁵ Post, p. 148.

¹⁶⁶ *Bank of Republic v. Baxter*, 31 Vt. 101.

Where the payee obtained certification by fraud, the bank was not estopped as against a transferee in good faith and for value, but by assignment and not by negotiation. *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765 (cf. *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-433.

¹⁶⁷ *Times Square Automobile Co. v. Rutherford Nat. Bank*, 77 N. J. Law, 649, 73 Atl. 479, 134 Am. St. Rep. 811 (intimating that the defense would be open if certification had been at request of the drawer).

Where B. & Co. drew a check to the order of B., who had it cer-

Delay in presentment does not discharge the bank, and presentment may be made at any time within the period fixed by the statute of limitations.¹⁶⁸ On principle, as in the case of ordinary certificates of deposit,¹⁶⁹ demand is a prerequisite to the holder's right of action against the bank;¹⁷⁰ but under the Negotiable Instruments Law it seems that presentment is not necessary to charge the bank.¹⁷¹

Certification of Forged or Altered Check

After certification the bank cannot refuse payment to a holder in due course on the ground that the drawer's signature was forged.¹⁷² Here again the bank's position is the same

tified, and indorsed it to W. in payment for a horse, and W. deposited the check in plaintiff's bank, which credited him with the amount, but was notified by B., before payment to W., that W. had obtained the check by fraud, in an action by plaintiff against the drawee bank, wherein B. on interpleader was substituted as defendant, it was held that plaintiff might recover. Plaintiff bank was held to be a holder for value, though it had not parted with value. *Blake v. Hamilton Dime Savings Bank Co.*, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684.

It would seem that in such cases the fraudulent payee or holder should be charged as a constructive trustee for the drawer, and that the bank, if it had been notified by the drawer not to pay, should have the right and duty to protect the drawer by refusing payment to the holder. See 19 Harv. Law Rev. 143. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-433.

¹⁶⁸ *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-433; "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 394-398; *Cent. Dig.* §§ 996-1050.

¹⁶⁹ *Ante*, p. 79.

¹⁷⁰ *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 394-398; *Cent. Dig.* §§ 996-1050.

¹⁷¹ Negotiable Instruments Law, § 70; *ante*, p. 81.

¹⁷² *First Nat. Bank of Chicago v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247; *Commercial & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Baltimore*, 30 Md. 11, 96 Am. Dec. 554; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678. See

as if it had paid the check to the holder, in which case it could not recover the amount from him upon that ground.¹⁷³ There is even authority for the view that the bank cannot refuse payment to a holder in due course on the ground that prior to the certification the body of the check was altered, as where the amount was raised;¹⁷⁴ but the preponderance of authority is against this view. Here it is generally held that the holder is in no better position than a holder who had received payment of a raised check, who would be compelled to refund to the bank.¹⁷⁵ In other words, it has been held that, while the bank by certifying admits the genuineness of the drawer's signature, it does not admit the genuineness of the body of the instrument.¹⁷⁶

The Negotiable Instruments Law provides that, "where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance,"¹⁷⁷ and also that "the

"Banks and Banking," Dec. Dig. (Key No.) § 145; Cent. Dig. §§ 424, 425.

¹⁷³ Post, p. 160.

¹⁷⁴ Louisiana Nat. Bank v. Citizens' Bank of Louisiana, 28 La. Ann. 189, 26 Am. Rep. 92. See, also, Espy v. First Nat. Bank, 18 Wall. 604, 21 L. Ed. 947. See *"Banks and Banking," Dec. Dig. (Key No.) § 145; Cent. Dig. §§ 424, 425.*

¹⁷⁵ Post, p. 167.

¹⁷⁶ Marine Nat. Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305. See, also, Security Bank of New York v. National Bank of the Republic, 67 N. Y. 458, 23 Am. Rep. 129; Continental Nat. Bank v. Metropolitan Nat. Bank, 107 Ill. App. 455; Parke v. Roser, 67 Ind. 500, 33 Am. Rep. 102.

Where a bank negligently certified a raised check, and paid it to a bank with which it had been deposited, and which in reliance thereon paid the depositor, the first bank could not thereafter recover the amount from the second, whose right to retain the money rested, not in the mere certification, but on the estoppel arising from the subsequent acts of the first bank, and from its negligence until it was too late to protect the second bank or itself from loss. Continental Nat. Bank of New York v. Tradesmen's Nat. Bank of New York, 173 N. Y. 272, 65 N. E. 1108. See *"Banks and Banking," Dec. Dig. (Key No.) § 145; Cent. Dig. §§ 419-433.*

¹⁷⁷ Negotiable Instruments Law, § 187.

acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits: (1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse."¹⁷⁸

By certification the bank does not admit the genuineness of indorsement.¹⁷⁹

Liability of Drawer and Indorsers

By asking for and receiving the bank's certification, instead of payment, the holder of a check, as has been explained, necessarily discharges the drawer¹⁸⁰ and any indorsers of the

¹⁷⁸ Negotiable Instruments Law, § 62.

It was assumed by the late Dean Ames that, by virtue of the provision that the acceptor engages to pay the instrument "according to the tenor of his acceptance," the Negotiable Instruments Law has changed the former rule, for the better, so that an acceptor of a bill, or a bank certifying a check, must pay to the innocent holder the amount called for by the instrument at the time of acceptance or certification, even though the amount has been raised. 14 Harv. Law Rev. 242.

In view of the express provision that the acceptor admits the genuineness of the drawer's signature, without any provision that he admits the genuineness of the body of the instrument, this may, perhaps, be open to doubt. Perhaps this result is effected, to a limited extent, by section 124, which provides that "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to the original tenor." When the drawer would be liable on the check to this extent, it seems that to this extent the bank would be entitled to charge the drawer's account if it paid the check, and that consequently to this extent it should be liable to an innocent holder upon a check which had been raised before certification.

¹⁷⁹ First Nat. Bank of Chicago v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247. See "*Banks and Banking*," Dec. Dig. (Key No.) § 145; Cent. Dig. §§ 419-433.

¹⁸⁰ First Nat. Bank v. Whitman, 94 U. S. 343, 345, 24 L. Ed. 229; Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 193, Fed. Cas.

check.¹⁸¹ On principle, it seems that the result should be the same where the certification is procured by the drawer before delivery of the check;¹⁸² but, although there is some authority in support of this view,¹⁸³ the decisions have been that the drawer is not discharged where he has himself procured the certification before delivery of the check.¹⁸⁴ Such appears to be the rule under the Negotiable Instruments Law, which provides: "Where the holder of a check procures it to be ac-

No. 4,532; *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Metropolitan Nat. Bank of Chicago v. Jones*, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403; *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; *Tomlinson v. National German American Bank*, 73 Minn. 117, 75 N. W. 1028; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Freund v. Importers' & Traders' Nat. Bank*, 76 N. Y. 352; *French v. Irwin*, 4 Baxt. (Tenn.) 401, 27 Am. Rep. 769. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 437; *Cent. Dig.* § 1280.

¹⁸¹ *First Nat. Bank of Detroit v. Currie*, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 301, 404, 437; *Cent. Dig.* § 717½, 1275-1280.

¹⁸² The argument is strongly presented by Francis B. Jones, 6 Harv. Law Rev. 138.

¹⁸³ See *First Nat. Bank v. Whitman*, 94 U. S. 343, 345, 24 L. Ed. 229. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 437; *Cent. Dig.* §§ 1275-1280.

¹⁸⁴ *Larson v. Breene*, 12 Colo. 480, 21 Pac. 498; *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238, 89 Am. Dec. 436; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Born v. First Nat. Bank*, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, 353, 11 Am. Rep. 708; *Andrews v. German Nat. Bank*, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300.

Though the payee refuses to accept the check without certification, if the drawer has it certified before delivering it, the drawer is not discharged. *Randolph Nat. Bank v. Hornblower*, 160 Mass. 401, 35 N. E. 850.

An indorser is not discharged where he procures certification. *Mutual Nat. Bank v. Rotgé*, 28 La. Ann. 933, 26 Am. Rep. 126. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 437; *Cent. Dig.* §§ 1275-1280.

cepted or certified, the drawer and indorsers are discharged from liability thereon.”¹⁸⁵

Form of Certification

At common law parol acceptances of bills of exchange were sustained, and some cases have held that a verbal promise by the bank to pay the check operates as acceptance, though not as the equivalent of certification.¹⁸⁶ Where such parol acceptances have been sustained, the rule has been confined to cases where the bank has funds of the drawer in its hands, upon the ground that otherwise the promise would be within the statute of frauds, as being a promise to answer for the debt of another, while if the bank had funds its promise would be to pay its own debt to the drawer, the owner of the funds, and would be based upon consideration.¹⁸⁷ In several cases it has been held, upon no basis of principle, that if a bank pays a check upon an unauthorized indorsement, and charges the amount to the drawer's account, the bank in effect accepts or certifies the check in favor of the true holder.¹⁸⁸ In recent

¹⁸⁵ Negotiable Instruments Law, § 188. Cf. section 185; *Cullinan v. Union Surety & Guaranty Co.*, 79 App. Div. 409, 80 N. Y. Supp. 58.

See, also, the following cases, where certification was at request of the holder: *Times Square Automobile Co. v. Rutherford Nat. Bank*, 77 N. J. Law, 649, 73 Atl. 479, 134 Am. St. Rep. 811; *St. Regis Paper Co. v. Tonawanda Co.*, 107 App. Div. 90, 94 N. Y. Supp. 946; *Dunn v. Whalen*, 120 App. Div. 729, 105 N. Y. Supp. 588; *Blake v. Hamilton Dime Savings Bank Co.*, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684. See “*Bills and Notes*,” *Dec. Dig. (Key No.)* § 437; *Cent. Dig.* §§ 1275-1280.

¹⁸⁶ See *Espy v. First Nat. Bank*, 18 Wall. 604, 21 L. Ed. 947; *Farmers' & Merchants' Bank v. Dunbier*, 32 Neb. 487, 49 N. W. 376; *Barnet v. Smith*, 30 N. H. 256, 64 Am. Dec. 290. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 419½; “*Bills and Notes*,” *Dec. Dig. (Key No.)* §§ 68, 69; *Cent. Dig.* §§ 110-119.

¹⁸⁷ *Morse v. Massachusetts Nat. Bank*, Holmes, 209, Fed. Cas. No. 9,857; *Leach v. Hill*, 106 Iowa, 171, 76 N. W. 667. See “*Bills and Notes*,” *Dec. Dig. (Key No.)* §§ 68, 69; *Cent. Dig.* §§ 110-119; “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 419½.

¹⁸⁸ *Seventh Nat. Bank v. Cook*, 73 Pa. 483, 13 Am. Rep. 751; *Dodge*

times it has been very generally provided by statute that the acceptance of a bill of exchange must be in writing, and such statutes have been construed as applicable to checks.¹⁸⁹ Under the Negotiable Instruments Law, the certification or acceptance of a check "must be in writing and signed by the drawee,"¹⁹⁰

v. National Exchange Bank, 20 Ohio St. 234, 5 Am. Rep. 648; *Id.*, 30 Ohio St. 1; *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900. *Contra*: *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; *Sims v. American Nat. Bank of Ft. Smith* (Ark.) 135 S. W. 356. *See "Bills and Notes," Dec. Dig. (Key No.)* §§ 68, 69; *Cent. Dig. §§ 110-119*; "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig. § 419½*.

¹⁸⁹ *Garrettson v. North Atchison Bank* (C. C.) 47 Fed. 867; *Eakin v. Citizens' State Bank*, 67 Kan. 338, 72 Pac. 874; *Duncan v. Berlin*, 60 N. Y. 151; *National State Bank of Camden v. Lindeman*, 161 Pa. 199, 28 Atl. 1022. *See "Bills and Notes," Dec. Dig. (Key No.)* §§ 68, 69; *Cent. Dig. §§ 110-119*; "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 140, 145; *Cent. Dig. §§ 386-388, 419½*.

¹⁹⁰ *Negotiable Instruments Law*, § 132. *See*, also, sections 185, 187-189; *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182; *Baltimore & O. Ry. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837.

Section 137 provides: "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within 24 hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." It has been held that, while section 132 abolishes verbal and implied acceptance, it does not affect a so-called "constructive" acceptance under section 137, and that, where a drawee bank failed to return checks sent to it for payment within 24 hours after their delivery to it by a collecting bank, the drawee must be deemed to have accepted them, and was liable to the holder thereon. *Wisner v. First Nat. Bank of Gallitzin*, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266. *See*, also, *State Bank v. Weiss*, 46 Misc. Rep. 93, 91 N. Y. Supp. 276.

These cases are open to the criticism that section 137 by its express terms applies only to a bill delivered for "acceptance," and does not apply to a bill delivered for payment. *See Westberg v. Chicago Lumber & Coal Co.*, 117 Wis. 589, 94 N. W. 572. Indeed, the applicability of this section at all to a check, which is not presentable

and there are now few jurisdictions, if there are any, where a parol acceptance or certification would be good. Usually the certification is in the form of the word "good." Sometimes the word "certified" is used. Certification may be accomplished by any similar words, which indicate a statement that the drawer has funds in the bank applicable to the payment of the check, and that the bank will so apply them.¹⁹¹

Power and Authority to Certify

The certification of checks is a power incident to the business of banking.¹⁹² It is within the power of a national bank, although certification when the funds are insufficient is prohibited.¹⁹³

for acceptance, in the sense that it is dishonored by nonacceptance, is questionable.

Under former statutes, which were substantially the same as section 137, it has been held that mere retention was not the equivalent of refusal to return. See *Matteson v. Moulton*, 11 Hun (N. Y.) 268; *Id.*, 79 N. Y. 627; *Dickinson v. Marsh*, 57 Mo. App. 566; *St. Louis Southwestern R. Co. v. James*, 78 Ark. 490, 95 S. W. 804. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 68, 69; *Cent. Dig. §§ 110-119*; "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 140, 145; *Cent. Dig. §§ 386-388, 419½*.

¹⁹¹ *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229, per Hunt, J. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig. §§ 386-388, 419½*.

¹⁹² See *Merchants' Nat. Bank v. State Bank*, 10 Wall. 604, 647, 19 L. Ed. 1008. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig. §§ 419-433*.

¹⁹³ *Merchants' Nat. Bank of Wheeling v. First Nat. Bank of Wheeling*, 7 W. Va. 544; post, p. 405.

Rev. St. U. S. § 5208 (U. S. Comp. St. 1901, p. 3497), which makes it unlawful for any national bank to certify any check, unless the drawer has on deposit money sufficient to meet the same, but declares that a check so certified shall be a valid obligation against the bank, does not, as between the parties, invalidate a pledge of bonds made by the drawer of such checks to secure the indebtedness thereby created from him to the bank, when the transaction has been completed by payment of the checks. *Thompson v. Saint Nicholas Nat. Bank*, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig. §§ 419-433*.

Certification is within the power or authority of the president¹⁹⁴ of a bank, or of the cashier,¹⁹⁵ and generally of the teller.¹⁹⁶ While an officer who certifies a check where the drawer has insufficient funds exceeds his authority, under the general rule of agency the certification, if by a proper officer, binds the bank as against a bona fide holder.¹⁹⁷ It is otherwise if the officer has no general authority to certify at all.¹⁹⁸ Obviously the certification of a postdated check is improper, and such certification generally carries notice that the certification was unauthorized.¹⁹⁹

¹⁹⁴ See *Clafin v. Farmers' & Citizens' Bank*, 25 N. Y. 293; post, p. 315. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 109, 145; *Cent. Dig.* §§ 254-260, 419-433.

¹⁹⁵ *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667. Cf. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008; post, p. 321. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 109, 145; *Cent. Dig.* §§ 254-260, 419-433.

¹⁹⁶ *Farmers' & Mechanics' Bank of Kent County v. Butchers' & Drovers' Bank*, 28 N. Y. 425; *Continental Nat. Bank v. National Bank of Commonwealth*, 50 N. Y. 575. Contra: *Mussey v. President, etc., of Eagle Bank*, 9 Metc. (Mass.) 306; post, p. 327. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 109, 145; *Cent. Dig.* §§ 254-260, 419-433.

¹⁹⁷ *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623; *Id.*, 16 N. Y. 125, 69 Am. Dec. 678; *Farmers' & Mechanics' Bank of Kent County v. Butchers' & Drovers' Bank*, 28 N. Y. 425; *Cooke v. State Nat. Bank*, 52 N. Y. 106, 11 Am. Rep. 667.

This is so, even where a statute makes it unlawful to certify a check in the absence of funds. *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 99 N. W. 399, 112 Am. St. Rep. 370; *First Nat. Bank v. Union Trust Co.*, 158 Mich. 94, 122 N. W. 547, 133 Am. St. Rep. 362.

Where a check on its face showed that the president, who falsely certified it, was attempting to use his official character for his own benefit, no one could recover as a bona fide holder. *Clafin v. Farmers' & Citizens' Bank*, 25 N. Y. 293. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 109, 145; *Cent. Dig.* §§ 253-260, 419-421.

¹⁹⁸ *Mussey v. President, etc., of Eagle Bank*, 9 Metc. (Mass.) 306; *Pope v. Bank of Albion*, 57 N. Y. 126. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-421.

¹⁹⁹ See *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592;

Certified Notes

Where a note is by its terms payable at a bank, the note may be certified in the same manner and with the same effect as a check,²⁰⁰ at least in jurisdictions where the rule prevails that such a note confers authority on the bank to apply the maker's deposit to its payment.²⁰¹

Pope v. Bank of Albion, 57 N. Y. 126. Cf. Smith v. Field, 19 Idaho, 558, 114 Pac. 668. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-421.

²⁰⁰ Riverside Bank v. First Nat. Bank, 74 Fed. 276, 20 C. C. A. 181; Meads v. Merchants' Bank of Albany, 25 N. Y. 143, 82 Am. Dec. 331, affirming Irving Bank v. Wetherald, 34 Barb. 323. See 2 Ames. Cas. Bills & Notes, 802.

The certification cannot be rescinded, because made under a misapprehension as to the sufficiency of the maker's account. Riverside Bank v. First Nat. Bank, *supra*. But see Second Nat. Bank of Baltimore v. Western Nat. Bank of Baltimore, 51 Md. 128, 34 Am. Rep. 300; Irving Bank v. Wetherald, 36 N. Y. 335; National Park Bank of New York v. Steele & Johnson Mfg. Co., 58 Hun, 81, 11 N. Y. Supp. 538. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* §§ 419-433.

²⁰¹ *Ante*, p. 58.

CHAPTER IV

PAYMENT OF CHECKS

- 40. Duty of Bank to Depositor.
- 41. Rights of Bank upon Payment—In General.
- 42. Revocation of Order.
- 43. Forged Checks—Signature of Drawer Forged.
- 44. Altered Check.
- 45. Forged Indorsement

DUTY OF BANK TO DEPOSITOR

40. It is the duty of a bank on which a check is drawn by a depositor to pay it on presentment, if he has on deposit sufficient funds to his credit, and for a refusal so to do the bank is liable to him for such damages as are the natural and reasonable consequences of the dishonor of the check.

Duty of Bank to Pay—In General

When a bank receives funds on deposit, by reason of the customs and nature of the business it impliedly contracts with the depositor that it will pay checks drawn by him to the amount of the deposit, and a refusal to honor his check when there are sufficient funds is a breach of contract, for which an action for damages lies.¹ And for such refusal he may also sue in tort.² The liability in tort, although its basis is

¹ An action for damages for refusal to honor a check is to be distinguished from a mere action to recover a deposit. *First Nat. Bank of Tamaqua v. Shoemaker*, 117 Pa. 94, 11 Atl. 304, 2 Am. St. Rep. 649; ante, p. 90. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* § 414.

² *Marzetti v. Williams*, 1 B. & Ad. 415; *Citizens' Nat. Bank of Davenport v. Importers' & Traders' Bank of New York*, 119 N. Y. 195, 23 N. E. 540; *National Bank of New Jersey v. Berrall*, 70 N.

not clear, appears to rest upon a slander of credit, in that the wrongful act of the banker in refusing to honor the check imports insolvency, dishonesty, or bad faith to the drawer;³ but in some cases the liability appears to be based upon the ground that the refusal is the violation of a duty imposed by public policy upon banks as institutions of a quasi public character, chartered for the purpose, inter alia, of safely keeping the money of individuals and corporations.⁴ Where the liability is made to rest upon a slander of credit, it is sometimes confined to cases where the drawer of the check is a "merchant" or "trader," on the ground that the dishonor of his check is an effectual way of slandering him in his trade;⁵ but other cases hold that the terms are not to be construed in a restrictive sense, and include any person who is engaged in business and whose credit is thus necessarily injured.⁶ Where

J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821. See "*Banks and Banking*," Dec. Dig. (Key No.) § 143; Cent. Dig. § 414.

³ Rolin v. Steward, 14 C. B. 595; Svendsen v. State Bank of Duluth, 64 Minn. 40, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. Rep. 522; J. M. James Co. v. Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857. See, also, Hanna v. Drovers' Nat. Bank, 92 Ill. App. 611; Id., 194 Ill. 252, 62 N. E. 556. See "*Banks and Banking*," Dec. Dig. (Key No.) § 143; Cent. Dig. § 414.

⁴ Patterson v. Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778. See, also, American Nat. Bank v. Morey, 113 Ky. 857, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379; Id. (Ky.) 80 S. W. 157.

See discussion by Professor Huffcut, 2 Columb. L. Rev. 193. This theory overlooks the fact that the liability would be the same in the case of a private banker, as well as that banks are under no general duty to receive deposits. Ante, p. 15. See 15 Harv. Law Rev. 757. See "*Banks and Banking*," Dec. Dig. (Key No.) § 143; Cent. Dig. § 414.

⁵ See cases, ante, note 3.

⁶ Peabody v. Citizens' State Bank of St. Charles, 98 Minn. 302, 108 N. W. 272; Davis v. Standard Nat. Bank, 50 App. Div. 210, 63 N. Y. Supp. 764. See "*Banks and Banking*," Dec. Dig. (Key No.) § 143; Cent. Dig. § 414.

the liability is made to rest upon the broader ground of a duty imposed by public policy, no limitation arising from the character of the drawer is imposed. In a recent Massachusetts case, the court prefers to base the cause of action solely upon contract, and says: "The cause of action, though sometimes spoken of as in the nature of a tort, arises out of the breach of the contract, implied by the relation of the parties, that the banker will honor the checks of the depositor."⁷

Damages for Wrongful Dishonor

Where the views as to the nature of the liability are so divergent, the courts are naturally not in accord as to the rules of damages, although they agree that the plaintiff may, upon proper pleading and proof, recover any damages which are the natural and reasonable consequences of the dishonor. The rules generally prevailing may be stated as follows: If the plaintiff is a merchant or trader, injury to his credit may be inferred from that fact, and substantial damages may be recovered, without allegation or proof of special damages; while if the plaintiff is not a trader, only upon allegation and proof of special damages may substantial damages be recovered, and without such allegation and proof, if the act of the bank was without malice, only nominal damages may be recovered.⁸ On the other hand, upon the ground that the refusal to honor a check is necessarily a discredit to the drawer,

⁷ *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655. See, also, *Kleopfer v. First Nat. Bank*, 65 Kan. 774, 70 Pac. 880. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 414.

⁸ *Rolin v. Steward*, 14 C. B. 595; *Third Nat. Bank of St. Louis v. Ober*, 178 Fed. 678, 102 C. C. A. 178; *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655; *Burroughs v. Tradesmen's Nat. Bank*, 87 Hun, 6, 33 N. Y. Supp. 864, affirmed 156 N. Y. 663, 50 N. E. 1115; *T. B. Clark Co. v. Mt. Morris Bank*, 85 App. Div. 362, 83 N. Y. Supp. 447, affirmed 181 N. Y. 533, 73 N. E. 1133; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 38 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 414.

some cases allow substantial damages without proof of special damages, although the drawer was not a merchant or trader.⁹ The damages must not exceed such as are the natural and reasonable consequences of the breach;¹⁰ but if the act of the bank was malicious, damages for mental suffering may be awarded.¹¹

When Refusal to Pay Wrongful

Whether a refusal to honor a check is wrongful depends upon the actual state of the account.¹² The bank may refuse to pay if there are not sufficient funds to the credit of the depositor after offsetting any indebtedness due from him,¹³ but not an indebtedness which has not matured.¹⁴ If the balance

⁹ *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; *Hilton v. Jesup Banking Co.*, 128 Ga. 30, 57 S. E. 78, 11 L. R. A. (N. S.) 224; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; *Columbia Nat. Bank v. MacKnight*, 29 App. D. C. 580; *Lorick v. Palmetto Bank & Trust Co.*, 74 S. C. 185, 54 S. E. 206. See *Metropolitan Supply Co. v. Garden City Banking & Trust Co.*, 114 Ill. App. 318. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 414.

¹⁰ *American Nat. Bank v. Morey*, 113 Ky. 857, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379; *Brooke v. Tradesmen's Nat. Bank*, 69 Hun. 202, 23 N. Y. Supp. 802; *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 414.

¹¹ *Davis v. Standard Nat. Bank*, 50 App. Div. 210, 63 N. Y. Supp. 764.

As to exemplary damages, see *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 414.

¹² *American Exchange Nat. Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 414.

¹³ *Garnett v. McEwen*, L. R. 8 Exch. 10; *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262, 35 S. W. 911, 32 L. R. A. 568. Cf. *Callahan v. Bank of Anderson*, 69 S. C. 374, 48 S. E. 293; ante, p. 61. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 134, 143; *Cent. Dig.* §§ 353-374, 414.

¹⁴ *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655; ante, p. 64. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 134; *Cent. Dig.* §§ 353-374.

is not sufficient to pay the check in full, the bank is not required to make part payment, for it is entitled to possession of the check as a voucher.¹⁵ The bank is entitled to a reasonable time after presentment of a check in which to ascertain the state of the account, but after the expiration of a reasonable time it will be liable for refusal to pay, if the depositor's funds were sufficient.¹⁶ If a check is by its terms payable only when presented through a designated bank, the drawee bank is not required to pay the check when presented by another bank.¹⁷

The duty and authority of a bank to pay a check are determined by countermand of payment¹⁸ or by notice of the depositor's death.¹⁹ It may refuse to pay if it has been notified that the money belongs to another than the depositor.²⁰

¹⁵ In re Brown, 2 Story, 502, Fed. Cas. No. 1,985, per Story, J. See, also, Beauregard v. Knowlton, 156 Mass. 395, 31 N. E. 389; Murray v. Judah, 6 Cow. (N. Y.) 484.

So held in jurisdictions where a check was held to operate as an assignment upon presentment. Bank of Antigo v. Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; Henderson & Co. v. United States Nat. Bank, 59 Neb. 280, 80 N. W. 898.

It has been said that the bank may, if it wishes, credit the amount of the deposit on the check. Dana v. Third Nat. Bank in Boston, 13 Allen (Mass.) 445, 90 Am. Dec. 216; Bromley v. Commercial Nat. Bank, 9 Phila. (Pa.) 522. See "*Banks and Banking*," Dec. Dig. (Key No.) § 134; Cent. Dig. §§ 353-374.

¹⁶ Marzetti v. Williams, 1 B. & Ad. 415; Whitaker v. Bank of England, 1 C., M. & R. 744. See "*Banks and Banking*," Dec. Dig. (Key No.) § 134; Cent. Dig. §§ 353-374.

¹⁷ So held where a check drawn on a bank in N. was stamped, "Payable through the C. bank of V. at current rate." Farmers' Bank of Nashville v. Johnson, King & Co., 134 Ga. 486, 68 S. E. 85, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242. See "*Banks and Banking*," Dec. Dig. (Key No.) § 138; Cent. Dig. §§ 398-405.

¹⁸ Post, p. 152.

¹⁹ Post, p. 153.

²⁰ Hanna v. Drovers' Nat. Bank, 194 Ill. 252, 62 N. E. 556; Pearce v. Dill, 149 Ind. 136, 48 N. E. 788. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 138, 139; Cent. Dig. §§ 380-405.

RIGHTS OF BANK UPON PAYMENT

41. **IN GENERAL**—Where a bank pays the check of a depositor in accordance with the order therein contained, it has the right to charge the payment to his account, and he is liable to the bank for any deficiency if his deposit was less than the amount paid. Although the bank has paid the check under the mistaken assumption or belief that the deposit was sufficient, the bank cannot, by the weight of authority, recover back the money from the payee upon the ground of mistake.
42. **REVOCATION OF ORDER**—The duty and authority of a bank to pay a check is determined by countermand of payment, and also (it seems) by notice of the drawer's death.

Payment in General

Where a bank pays a depositor's check, it has, of course, the right to deduct the amount paid from the amount of deposits standing to his credit. And while it is under no obligation to honor his check if he has not sufficient funds to his credit, it may pay the check if it sees fit, and will thereupon be entitled to recover from him the amount of the overdraft.²¹

To constitute payment, so as to entitle the bank to charge the depositor with the amount, it is not necessary that it shall have actually made the payment in cash. If the holder of the check consents to receive credit with the bank, instead of money, it is enough.²² Or if at his request the bank certifies

²¹ Ante, p. 82.

²² Second Nat. Bank of New Albany v. Gibboney, 43 Ind. App. 492, 87 N. E. 1064; Albers v. Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355; Consolidated Nat. Bank of New York v. First Nat. Bank of Middletown, 129 App. Div. 538, 114 N. Y. Supp. 308 (cf. Republic Life Ins. Co. v. Hudson Trust Co., 130 App. Div. 618, 115 N. Y. Supp. 504); American Nat. Bank of Nashville, Tenn., v. Miller, 185 Fed.

the check, the transaction operates as payment so far as the drawer is concerned.²³

Payment Under Mistake as to Sufficiency of Deposit

If the bank pays a check under the mistaken assumption or belief that the drawer's deposit is sufficient, by the weight of authority the bank must nevertheless look to him alone for repayment, and cannot recover back the amount from the payee upon the ground of a mistake of fact.²⁴ The payment of a check under such circumstances to a bona fide holder, as between him and the bank, is a finality.²⁵ The rule is perhaps most satisfactorily supported on the ground of commercial convenience, which requires that the drawee bank should be the place of final settlement, where mistakes should

338, 107 C. C. A. 456. See, also, *Montgomery County v. Cochran*, 126 Fed. 456, 62 C. C. A. 70; *Bartley v. State*, 53 Neb. 310, 73 N. W. 744.

As to checks presented through clearing house, post, p. 179. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 347, 348.

²³ Ante, p. 132.

²⁴ *Chambers v. Miller*, 13 C. B. N. S. 125; *Pollard v. Bank of England*, L. R. 6 Q. B. 623; *Riverside Bank v. First Nat. Bank*, 74 Fed. 276, 20 C. C. A. 181; *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *City Nat. Bank of Selma v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *First Nat. Bank of Denver v. Devenish*, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394; *Manufacturers' Nat. Bank v. Swift*, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381; *National Exchange Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. 1026, 33 L. R. A. (N. S.) 963; *Bank of State v. Hull*, Dud. (S. C.) 259; *Spokane & Eastern Trust Co. v. Huff* (Wash.) 115 Pac. 80, 33 L. R. A. (N. S.) 1023. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 142, 150; *Cent. Dig.* §§ 410-413, 455-464½.

²⁵ So where the bank pays after countermand by the drawer. *National Bank of New Jersey v. Berrall*, 70 N. J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821. Cf. *Northampton Nat. Bank v. Smith*, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283.

It is otherwise if the payee is not a bona fide holder. *Starkweather v. Emerson Mfg. Co.*, 132 Iowa, 266, 109 N. W. 719; *James River Nat. Bank of Jamestown v. Weber* (N. D.) 124 N. W. 952 (payment to drawer). See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 142, 150; *Cent. Dig.* §§ 410-413, 455-464½.

be settled once and for all.²⁶ In one case the mistake was discovered while the holder of the check was still at the bank counter; but it was held that, the property having passed, the money belonged irrevocably to the payee.²⁷ In Massachusetts, however, if the bank has paid in the mistaken belief that the funds of the drawer are sufficient, upon discovering its mistake the bank may recover back the money, unless the person receiving payment has changed his position before receiving notice of the mistake;²⁸ and in New York the rule appears to be the same.²⁹

When Bank Protected in Paying

The duty of a bank to honor the drawer's check arises from the fact that he is a depositor, that is, a creditor of the bank, and that he has a right to have the bank pay its indebtedness to him as he may direct. If he has made the deposit, and it stands in his name, he alone has the right to direct pay-

²⁶ *Spokane & Eastern Trust Co. v. Huff* (Wash.) 115 Pac. 80, 33 L. R. A. (N. S.) 1023; post, p. 165.

It has also been explained on the doctrine of *Price v. Neal* (post, p. 162). See 4 Harv. Law Rev. 297, 305. But here the equities can hardly be called equal, since upon payment being refused the holder still has recourse against the drawer. See 25 Harv. Law Rev. 185. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 142, 150; Cent. Dig. §§ 410-413, 455-464½.

²⁷ *Chambers v. Miller*, 13 C. B. N. S. 125. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 142, 150; Cent. Dig. §§ 410-413, 455-464½.

²⁸ *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120; *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513, 2 N. E. 89. Cf. *Boylston Nat. Bank v. Richardson*, 101 Mass. 287; post, p. 181. See "*Banks and Banking*," Dec. Dig. (Key No.) § 142; Cent. Dig. §§ 410-413.

²⁹ *National Park Bank of New York v. Steele & Johnson Mfg. Co.*, 58 Hun, 81, 11 N. Y. Supp. 538; *Citizens' Central Nat. Bank v. New Amsterdam Nat. Bank*, 128 App. Div. 554, 112 N. Y. Supp. 973. See, also, *Irving Bank v. Wetherald*, 36 N. Y. 335. But see *Oddie v. National City Bank of New York*, 45 N. Y. 735, 6 Am. Rep. 160; post, p. 181. See "*Banks and Banking*," Dec. Dig. (Key No.) § 142; Cent. Dig. §§ 410-413.

ment of it. The bank is consequently protected if it pays in accordance with his order. It need not inquire into the equitable ownership of the deposit, and may safely assume that he has a right to dispose of it, unless it has received notice of an adverse claim.³⁰ Nor is a bank under a duty to supervise and safeguard a trust account, or to look after the appropriation of the funds when withdrawn, in the absence of circumstances putting it upon inquiry.³¹

Again, a bank is protected in paying a check although the drawer may have a personal defense, such as fraud, duress, or illegality of consideration, which he could assert as against the holder, at least if the bank pays without notice that such defenses exists.³²

Time of Payment

As has been stated, presentment to the bank for payment is sufficient to charge the drawer of a check, unless he is prejudiced by the delay, if made at any time within the period of the statute of limitations;³³ and within this time the bank

³⁰ *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617, 89 N. W. 618; *Carr v. Fidelity Bank*, 126 N. C. 186, 35 S. E. 246; ante, p. 43. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

³¹ *Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408; *City of Newburyport v. Spear*, 204 Mass. 146, 90 N. E. 522, 134 Am. St. Rep. 652; ante, p. 45. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

³² *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780 (gaming consideration); *Southern Hardware & Supply Co. v. Lester*, 166 Ala. 86, 52 South. 328 (duress). In *McCord v. California Nat. Bank of San Diego*, 96 Cal. 197, 31 Pac. 51, it was held that although the bank cashed a check, knowing that it was given in payment of a bet made in violation of law, the drawer could not recover from the bank. Cf. *Drinkall v. Movius State Bank*, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

³³ Ante, p. 118.

may safely pay a check, at least if it does not turn out to be subject to defenses as between the holder and the drawer. It is said, however, that the age of a check is a cause of suspicion, and that it is the right and even the duty of a bank to make inquiry before paying a stale check. Refusal to pay a stale check until the bank shall have had a reasonable time to make inquiry of the drawer would probably not be deemed a dishonor of the check in an action by the holder against the drawer,⁸⁴ or in an action by the drawer against the bank. And if the bank pays the check without inquiry, when inquiry would have led to the discovery of the fact that it ought not to have been paid, it is said that the bank must bear the loss,⁸⁵ although there is little authority upon the point. It would seem that within this rule, as in cases between transferrer and transferee,⁸⁶ a check will not be deemed stale if it has been outstanding for only a few days.⁸⁷

Revocation of Order—Countermand of Payment

Since a check confers upon the payee or holder no right to drawer's deposit, the drawer has the right at any time before payment to countermand his order, or to stop payment of the check, by notice communicated to the bank.⁸⁸ The notice may be in writing or oral.⁸⁹ Such notice determines the right of the bank to pay the check, so that if it disregards the notice the payment is its own loss.⁴⁰ In states where it has been

⁸⁴ See 2 Ames, Cas. Bills & Notes, p. 724, note 1.

⁸⁵ Morse, Banks & B. (4th Ed.) § 443.

⁸⁶ Ante, p. 126.

⁸⁷ A check drawn on Christmas Eve did not become stale in six days. Merchants' & Planters' Nat. Bank of Union v. Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750. See Lancaster Bank v. Woodward, 18 Pa. 357, 57 Am. Dec. 618. See "Banks and Banking," Dec. Dig. (Key No.) § 138; Cent. Dig. §§ 398-405.

⁸⁸ Ante, p. 127.

⁸⁹ People's Savings Bank & Trust Co. v. Lacey, 146 Ala. 688, 40 South. 346. See "Banks and Banking," Dec. Dig. (Key No.) § 139; Cent. Dig. §§ 406-409.

⁴⁰ People's Savings Bank & Trust Co. v. Lacey, 146 Ala. 688, 40

held that a check operates as an assignment to the holder of the deposit pro tanto,⁴¹ it has been held, also, that the drawer could not defeat the holder's right by stopping payment of the check;⁴² but wherever the Negotiable Instruments Law has been enacted the right of the drawer to stop payment is now absolute.⁴³ If, however, the check has been certified, thereby substituting the obligation of the bank, the drawer can no longer stop payment.⁴⁴ For the same reason, in the case of a cashier's check, which being drawn by the bank upon itself, is in legal effect a promissory note, the right to stop payment does not apply.⁴⁵

Death of Drawer

It is commonly said that the authority of a bank to pay a check is determined by the death of the drawer, although there is little direct authority.⁴⁶ At the same time it is gener-

South. 346; *Albers v. Commercial Bank*, 85 Mo. 173, 55 Am. Rep. 355; *Schneider v. Irving Bank*, 30 How. Prac. (N. Y.) 190; *Id.*, 1 Daly (N. Y.) 500; *Elder v. Franklin Nat. Bank*, 25 Misc. Rep. 716, 55 N. Y. Supp. 576. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁴¹ Ante, p. 129.

⁴² *First Nat. Bank of Du Quoin v. Keith*, 183 Ill. 475, 56 N. E. 179; *Loan & Savings Bank v. Farmers' & Merchants' Bank*, 74 S. C. 210, 54 S. E. 364, 114 Am. St. Rep. 991. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁴³ Ante, p. 130; *Pease & Dwyer Co. v. State Nat. Bank*, 114 Tenn. 693, 88 S. W. 172. See, also, *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655. Cf. *Raesser v. National Exch. Bank*, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁴⁴ Ante, p. 132.

⁴⁵ *Drinkall v. Movius State Bank*, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁴⁶ See *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Second Nat. Bank of Detroit v. Williams*, 13 Mich. 282; *Brennan v. Merchants' & Manufacturers' Nat. Bank*, 62 Mich. 343, 28 N. W. 881; *Drum v. Benton*, 13 App. D. C. 245.

The English Bills of Exchange Act, § 75, provides: "The duty and

ally assumed that if the bank pays without knowledge of the death the payment is good, and the bank is not liable to the drawer's estate.⁴⁷ The cases in which it has been declared that payment with knowledge is unauthorized have generally been cases of gift, in which other considerations were involved,⁴⁸ and the question does not appear to have been actually decided in any case where the check was given for value.⁴⁹ On principle, there appears to be no reason why the order contained in a check should be revoked by mere knowledge of the drawer's death,⁵⁰ although the personal representatives of the drawer would, of course, have the right to

authority of a banker to pay a cheque drawn on him by his customer are determined by: (1) Countersmand of payment; (2) notice of the customer's death." See *In re Beaumont*, [1902] 1 Ch. 889.

It is said that the Negotiable Instruments Law in its original draft contained the following: "The death of the drawer does not operate as a revocation of the authority of the bank to pay a check if the check is presented for payment within ten days from the date thereof"—but that this was struck out from the final draft. The proposed provision was taken from Pub. St. Supp. Mass. 1888, p. 301, c. 210. See Huffcut, *Neg. Inst.* 80. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* § 408.

⁴⁷ See *Tate v. Hilbert*, 2 Ves. Jr. 111; *Brennan v. Merchants' & Manufacturers' Nat. Bank*, 62 Mich. 343, 28 N. W. 881. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* § 408.

⁴⁸ See *Tate v. Hilbert*, 2 Ves. Jr. 117; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Fordred v. Seamen's Savings Bank*, 10 Abb. Prac. (N. S. N. Y.) 425. But see, *Phinney v. State ex rel. Stratton*, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119.

Where a check was drawn and delivered as a gift, with a request not to present it till after the donor's death, the death revoked the gift, and the bank paying with notice of the death was liable to the drawer's estate. *Pullen v. Placer County Bank*, 138 Cal. 169, 71 Pac. 83, 94 Am. St. Rep. 19. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* § 408.

⁴⁹ See *Weiland's Adm'r v. State Nat. Bank of Maysville*, 112 Ky. 310, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁵⁰ See, *Morse, Banks & B.* (4th Ed.) § 400; *Daniel, Neg. Inst.* § 1618b. To the contrary, 17 Harv. Law Rev. 104, "Death of the

stop payment by notice.⁵¹ In the case of a bill of exchange, the rule appears to be that the order to accept is not revoked by the drawer's death.⁵² In jurisdictions where a check operates as an assignment, it seems that the death of the drawer would not work a revocation;⁵³ but a decision based on the assignment theory would not be any authority in other jurisdictions.⁵⁴

Whatever may be the duty and authority of the bank, the holder has, of course, a right to recover against the drawer's estate.

Insanity of Drawer

It seems that an adjudication of the drawer as insane will revoke the authority of the bank to pay a check.⁵⁵ But otherwise, where a deposit is made when the depositor is sane, the bank may pay the check at any time, in the absence of knowledge of his incapacity at the time of payment.⁵⁶

Signature of Check

In order to authorize a bank to apply the funds of a depositor to the payment of a check, the check must, of course, be

Drawer of a Check," by John Maxey Zane. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁵¹ *Weiland's Adm'r v. State Nat. Bank of Maysville*, 112 Ky. 310, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁵² See *Billings v. Devaux*, 3 Man. & Gr. 565; *Cutts v. Perkins*, 12 Mass. 206; 14 Harv. Law Rev. 588. Cf. *Negotiable Instruments Law*, § 185. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁵³ See *Lewis v. International Bank*, 13 Mo. App. 202 (the assignment theory no longer prevails in Missouri); *Wasgatt v. First Nat. Bank (Minn.)* 134 N. W. 224. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁵⁴ *Ante*, p. 127.

⁵⁵ *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 406-409.

⁵⁶ *Reed v. Mattapan Deposit & Trust Co.*, 198 Mass. 306, 84 N. E.

the check of the depositor.⁵⁷ If a check be drawn in the name of a depositor, but his signature was forged,⁵⁸ or if his signature purports to be made by an agent, but the signature was unauthorized,⁵⁹ the rights of the drawer are unaffected by the payment.

If an account stands in the name of joint depositors, the bank must require the signatures of all;⁶⁰ but if the account stands in the name of a partnership, the firm signature made by one partner is sufficient.⁶¹ If an account is in the name of a corporation, the signature must be made by an officer who is authorized to sign.⁶² It is customary for banks to require a depositor to file his signature, or the signature of such other persons as are authorized to sign, and in such case,

469. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 138, 139; *Cent. Dig.* §§ 398-409.

⁵⁷ *Ericano v. Columbia Nat. Bank*, 118 App. Div. 567, 103 N. Y. Supp. 189.

A bank which pays as garnishee under execution against a judgment debtor other than its depositor, though bearing the same name, is liable to the depositor. *O'Neil v. New England Trust Co.*, 28 R. I. 311, 67 Atl. 63, 11 L. R. A. (N. S.) 248, 125 Am. St. Rep. 740. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

⁵⁸ Post, p. 160.

⁵⁹ Post, p. 160.

A deposit may be made under such circumstances that the depositor is estopped from denying the authority of another to sign checks in the depositor's name. *Tobias v. Morris*, 126 Ala. 535, 28 South. 517. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

⁶⁰ *Columbia Finance & Trust Co. v. First Nat. Bank*, 116 Ky. 364, 76 S. W. 156; *Nieman v. Beacon Trust Co.*, 170 Mass. 452, 49 N. E. 748, 64 Am. St. Rep. 315. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

⁶¹ *Carr v. Fidelity Bank*, 126 N. C. 186, 35 S. E. 246. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

⁶² *First Nat. Bank of Allegheny v. Joseph Fleming & Son Co.*, 226 Pa. 416, 75 Atl. 718.

Where there are no circumstances to excite suspicion, the bank is not responsible if the money is misappropriated. *Hatch v. Johnson*

where the signature is actually by a person so authorized, the bank will be protected.⁶³ On the other hand, if a depositor instructs the bank to pay no checks not signed or countersigned by designated persons, and the bank disregards the instruction, the burden is upon the bank to show that the depositor actually received the benefit of the payment.⁶⁴

Conformity to Order

In order to give the bank the right to charge a payment to the depositor's account, the payment must be made in conformity with the order contained in the check.⁶⁵

The bank must at its peril ascertain that the person presenting the check is a person authorized thereby to receive payment. If the check is payable to order, payment must be

Loan & Trust Co. (C. C.) 79 Fed. 828. See "*Banks and Banking*," Dec. Dig. (Key No.) § 138; Cent. Dig. §§ 398-405.

⁶³ Shoe Lasting Mach. Co. of New York v. Western Nat. Bank, 70 App. Div. 588, 75 N. Y. Supp. 627. See "*Banks and Banking*," Dec. Dig. (Key No.) § 138; Cent. Dig. §§ 398-405.

⁶⁴ Ellis v. Western Nat. Bank, 136 Ky. 310, 124 S. W. 334; Gladstone Exch. Bank v. Keating, 94 Mich. 429, 53 N. W. 1110; Shoe Lasting Machine Co. of New York v. Western Nat. Bank, 70 App. Div. 588, 75 N. Y. Supp. 627.

Where the deposit was by a receiver of a corporation appointed by an order of court which provided that the funds should be paid out only on checks countersigned by the judge, of which the bank had knowledge, the bank was liable to creditors of the corporation for funds paid out on checks not countersigned. American Nat. Bank of Macon v. Fidelity & Deposit Co., 129 Ga. 126, 58 S. E. 867.

Where the depositor was a city, a city ordinance was not notice. City of Newburyport v. Spear, 204 Mass. 146, 90 N. E. 522, 134 Am. St. Rep. 652. See "*Banks and Banking*," Dec. Dig. (Key No.) § 138; Cent. Dig. §§ 398-405.

⁶⁵ National Dredging Co. v. President, etc., of Farmers' Bank, 6 Pennewill (Del.) 580, 69 Atl. 607, 16 L. R. A. (N. S.) 593, 130 Am. St. Rep. 158; Jordon Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250. See "*Banks and Banking*," Dec. Dig. (Key No.) § 138; Cent. Dig. §§ 398-405.

to the payee,⁶⁶ or one claiming under a genuine indorsement.⁶⁷ If the check is payable to bearer, the bank may pay it to any person who presents it,⁶⁸ unless there are circumstances to put it on inquiry as to his ownership of the check or as to defects in his title.⁶⁹ The Negotiable Instruments Law provides that an instrument is payable to bearer "when it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable."⁷⁰

The bank must observe the order in respect to the time of payment.⁷¹ If the check be postdated, payment before the date is unauthorized.⁷²

⁶⁶ *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595; *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. 1119.

The fact that the payee is dead when the check is drawn does not entitle the bank to pay to any other than his personal representative. *Murphy v. Metropolitan Nat. Bank*, supra. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 138, 140; *Cent. Dig.* §§ 398-405.

⁶⁷ *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 68 Pac. 115; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; *United Security Life Insurance & Trust Co. of Pennsylvania v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97; post, p. 171. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

⁶⁸ *Peerrot v. Mt. Morris Bank*, 120 App. Div. 247, 104 N. Y. Supp. 1045; *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

⁶⁹ See *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. 873; Negotiable Instruments Law, § 88. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-405.

⁷⁰ Negotiable Instruments Law, § 9(3); post, p. 173.

⁷¹ Ante, p. 151.

⁷² *Godin v. Bank of Commonwealth*, 6 Duer (N. Y.) 76. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 138; *Cent. Dig.* §§ 398-406.

FORGED CHECKS

43. **SIGNATURE OF DRAWER FORGED**—Where the drawee bank pays a check upon which the signature of the drawer was forged, the bank cannot charge the payment to his account, unless he by his conduct has precluded himself from contesting the right of the bank to make the payment or to charge his account. Nor can the bank, although it paid the check in ignorance of the forgery, recover back the amount from the person to whom it has been paid, if he was a bona fide holder of the check, unless by bad faith or misconduct he contributed to the success of the fraud or to the mistake under which the payment was made.
44. **ALTERED CHECK**—Where the drawee bank pays a check which was altered after its issue, the bank cannot charge the payment to the account of the drawer, unless by his conduct he has precluded himself from contesting the right of the bank to make the payment or to charge his account. The bank may recover back the amount from the person to whom it was paid, although he was a bona fide holder of the check.
45. **FORGED INDORSEMENT**—Where the drawee bank pays a check to one who is not entitled to receive payment because of a forged indorsement, the bank cannot charge the amount to the account of the drawer, unless by his conduct he has precluded himself from contesting the right of the bank to make payment. The bank may recover back the amount from the person to whom the payment was made.

Signature of Drawer Forged—Rights of Bank Against Drawer

Inasmuch as a bank can be authorized to pay out money upon the account of a depositor only upon his order, if it pays a check purporting to be drawn by him, but on which his signature was forged, his rights against the bank are not affected by the unauthorized payment.⁷³ And the result is the same if his signature was written by one who without authority assumed to act as his agent.⁷⁴ In either case the bank cannot charge the payment to the account of the drawer, unless his conduct was such as to estop him from denying the genuineness of the signature, or the authority of the agent,⁷⁵ or unless he subsequently ratifies the signature, or precludes himself from contesting the right of the bank to make the charge.⁷⁶

⁷³ See *Leather Mfrs.' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *First Nat. Bank of Birmingham v. Allen*, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; *Janin v. London & San Francisco Bank*, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; *National Dredging Co. v. President, etc., of Farmers' Bank*, 6 Pennewill (Del.) 580, 69 Atl. 607, 16 L. R. A. (N. S.) 593, 130 Am. St. Rep. 158; *Hardy v. Chesapeake Bank*, 51 Md. 585, 34 Am. Rep. 325; *Harter v. Mechanics' Nat. Bank*, 63 N. J. Law, 578, 44 Atl. 715, 76 Am. St. Rep. 224; *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

⁷⁴ *Georgia Railroad & Banking Co. v. Love & Good Will Soc.*, 85 Ga. 293, 11 S. E. 616. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

⁷⁵ *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. 380.

The mere possession by a depositor, without notice to the bank, of a rubber stamp making a fac-simile of his signature, did not make him liable for money paid out on checks forged therewith, nor upon the particular facts was he negligent in the care of the stamp, so as to make him liable. *Robb v. Pennsylvania Co. for Insurance on Lives and Granting Annuities*, 186 Pa. 456, 40 Atl. 969, 65 Am. St. Rep. 868; *Id. (Pa.)* 41 Atl. 49. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

⁷⁶ *Phoenix Nat. Bank v. Taylor*, 113 Ky. 61, 67 S. W. 27; *post*,

Same—Rights of Bank Against Payee

Where a bank upon which a check has been drawn pays it, in ignorance that the drawer's signature was forged, the bank cannot, as a rule, upon discovery of its mistake, recover back the amount, if the person to whom the money was paid was a bona fide holder.⁷⁷ The rule does not apply, however, if the party receiving the money has actually contributed by his bad faith or misconduct to the success of the fraud or to the mistake under which the payment was made, as where, when he received payment, he knew the check was forged, or knew of circumstances casting suspicion on its genuineness not known to the bank and which he failed to communicate to it,⁷⁸

p. 161. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

⁷⁷ *Smith v. Mercer*, 6 Taunt. 76; *First Nat. Bank of Marshalltown v. Marshalltown State Bank*, 107 Iowa, 327, 77 N. W. 1045, 44 L. R. A. 131; *Neal v. Coburn*, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; *Germania Bank of Minneapolis v. Boutell*, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519; *National Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513; *State Bank of Chicago v. First Nat. Bank of Omaha*, 87 Neb. 351, 127 N. W. 244, 29 L. R. A. (N. S.) 100; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Salt Springs Bank v. Syracuse Sav. Inst.* 62 Barb. (N. Y.) 101; *Title Guarantee & Trust Co. v. Haven*, 126 App. Div. 802, 111 N. Y. Supp. 305; *Trust Co. of America v. Hamilton Bank of New York*, 127 App. Div. 515, 112 N. Y. Supp. 84; *Yarborough v. Banking Loan & Trust Co.*, 142 N. C. 377, 55 S. E. 296; *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville*, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748; *Bank of St. Albans v. Farmers' & Mechanics' Bank*, 10 Vt. 141, 33 Am. Dec. 188. Cf. *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615 (under Pennsylvania statute). Contra: *First Nat. Bank of Lisbon v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 147; *Cent. Dig.* §§ 447-454.

⁷⁸ See *National Bank of North America of Boston v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *First Nat. Bank of Quincy v. Richer*,

or where he received the check under circumstances of suspicion, without the usual scrutiny or other precautions against mistake or fraud, as by accepting the check from a stranger without inquiry as to his identity and character.⁷⁹

The rule that a drawee pays at his peril a bill on which the drawer's signature is forged was established in 1762 in *Price v. Neal*.⁸⁰ "It is an action upon the case," said Lord Mansfield, "for money had and received to the plaintiff's use. In which action, the plaintiff cannot recover the money, unless it be against conscience in the defendant to retain it, and great liberality is always allowed in this sort of action. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had bona fide paid without the least privity or suspicion of forgery. * * * It was incumbent upon the plaintiff to be satisfied 'that the bill drawn upon him was in the drawer's hand,' before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. * * * It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one

71 Ill. 439, 22 Am. Rep. 104. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 147; *Cent. Dig.* §§ 447-454.

⁷⁹ *National Bank of North America of Boston v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *First Nat. Bank of Danvers v. First Nat. Bank of Salem*, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628, 64 Am. Dec. 610; *People's Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884 (cf. *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817); *Rouyant v. San Antonio Nat. Bank*, 63 Tex. 610; *Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761. See, also, *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 147; *Cent. Dig.* §§ 447-454.

⁸⁰ 3 Burr. 1354. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 147; *Cent. Dig.* §§ 447-454.

innocent man upon another innocent man; but, in this case, if there was any fault or negligence in any one, it was in the plaintiff, and not in the defendant."

The doctrine of *Price v. Neal* has been adversely criticised by many text-writers. It is argued that by indorsing the instrument, if it be indorsed, the holder warrants its genuineness, and that, even if he does not indorse it, his own assertion of ownership is a warranty of genuineness.⁸¹ In reply to this it is to be said that, although some cases speak of a so-called indorsement as imparting a warranty,⁸² an indorsement, strictly speaking, is an incident to the negotiation or transfer, and not to the payment, of a negotiable instrument, and that the writing of his name on the back of a negotiable instrument by one presenting it for payment is not an indorsement, but merely a receipt of payment or voucher.⁸³ Even an indorsement in its proper sense, although it warrants the genuineness of the drawer's signature to holders in due course,

⁸¹ Daniel, *Neg. Inst.* § 1361.

⁸² See *People's Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 147; *Cent. Dig.* §§ 447-454.

⁸³ *Neal v. Coburn*, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; *First Nat. Bank of Minneapolis v. City National Bank*, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637. See, also, *Keene v. Beard*, 8 C. B. N. S. 372, per Byles, B.; *Osborn v. Gheen*, 5 Mackey (D. C.) 189. An indorsement "for collection" does not warrant the drawer's signature. *Northwestern Nat. Bank of Chicago v. Bank of Commerce of Kansas City*, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102; *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville*, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748. Where a check is paid through the clearing house with an indorsement of the bank presenting it, "Indorsements guaranteed," this is a guaranty of the genuineness of the whole instrument, including indorsements, except the signature of the drawer. *New York Produce Exchange Bank v. Twelfth Ward Bank of City of New York*, 135 App. Div. 52, 119 N. Y. Supp. 988. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 147; *Cent. Dig.* §§ 447-454.

does not warrant its genuineness to the drawee.⁸⁴ Still less is a warranty to be implied where an instrument is presented without indorsement. A warranty of genuineness is implied, indeed, upon the transfer of a bill or a note transferable by delivery even without indorsement;⁸⁵ but the law attaches no such warranty to mere presentment, for to imply from presentment an assertion of the genuineness of the drawer's signature would be unnatural and illogical, in view of the relation of the parties, inasmuch as the holder has not, while the drawer has, means of knowing whether the signature is genuine.⁸⁶ Against the doctrine of *Price v. Neal* it is urged, also, with greater force, that ordinarily money paid under a mistake of fact may be recovered back, however negligent the party making the payment may have been in making the mistake, unless the payment has caused such a change in the position of the other that it would be unjust to require him to refund.⁸⁷

Although these criticisms have not been without influence upon some of the decisions,⁸⁸ the doctrine of *Price v. Neal* is

⁸⁴ *Germania Bank of Minneapolis v. Boutell*, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519; *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 148; *Cent. Dig.* §§ 438-452; "*Bills and Notes*," *Dec. Dig.* (Key No.) § 296; *Cent. Dig.* §§ 667-679.

⁸⁵ Negotiable Instruments Law, § 65.

⁸⁶ See *Bernheimer v. Marshall*, 2 Minn. 78 (Gil. 61), 72 Am. Dec. 89; 4 Harv. Law Rev. 301, 302. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 148; *Cent. Dig.* §§ 438-452.

⁸⁷ See *Morse, Banks & B.* (4th Ed.) § 462 et seq.

⁸⁸ See *First Nat. Bank of Lisbon v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588; *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette*, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221; *American Express Co. v. State Nat. Bank*, 27 Okl. 824, 113 Pac. 711, 33 L. R. A. (N. S.) 188; *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955; *Id.*, 46 Wash. 657, 91 Pac. 185. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 148; *Cent. Dig.* §§ 438-454.

firmly established in England and America. It is said to have been enacted by the codes of the principal countries of Continental Europe.⁸⁹ It has sometimes been explained as based on public policy or convenience, which requires that, as between the drawee and holders in good faith, the drawee bank should be deemed the place of final settlement, where all prior mistakes and forgeries should be corrected once and for all.⁹⁰ The best explanation of the doctrine, perhaps, is that it rests upon "that far-reaching principle of natural justice, that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money. A court of equity (and the action of assumpsit for money had or received is, in substance, a bill of equity) cannot properly interfere to compel the holder to surrender his legal advantage."⁹¹

⁸⁹ 4 Harv. Law Rev. 297; 17 Harv. Law Rev. 583.

⁹⁰ *Germania Bank of Minneapolis v. Boutell*, 60 Minn. 189, 193, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519, per Mitchell, J.

"Probably the rule was adopted from an impression of convenience rather than from any more academic reason." *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286, per Holmes, C. J. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-454.

⁹¹ "The Doctrine of *Price v. Neal*," by the late Dean J. B. Ames, 4 Harv. Law Rev. 297, 299. He adds: "Lord Mansfield considered, it is true, the question of the drawee's negligence, but it is evident * * * that he based his opinion chiefly upon the principle just stated." "The opposition of some text-writers to the rule seems to us to arise from the fact that the many courts seized hold of one of the lesser reasons given by Lord Mansfield, * * * and from it worked out a theory of estoppel against the drawee to dispute the signature of the drawer. Hence the failure of the courts of this country to apply the principle of *Price v. Neal* to genuine draft which has been altered after the drawing and before ac-

The view has been advanced by some courts,⁹² with good reason, that the doctrine of *Price v. Neal* is now the law in all states which have enacted the Negotiable Instruments Law, by virtue of the provisions that a check is a bill of exchange, except as therein otherwise provided, that a certification is equivalent to an acceptance, and that "the acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument." If a bank certifying a forged check must pay it, a fortiori a bank which has paid such a check without certification should not recover the money paid from a bona fide holder.

Altered Check—Rights of Bank Against Drawer

Since a bank is authorized to pay upon the account of a depositor only in conformity with his order, if a bank pays a check which was materially altered after its issue, it cannot, at least in the absence of special circumstances,⁹³ charge the payment to the drawer.⁹⁴ Such an alteration, indeed, unless,

ceptance or payment." 17 Harv. Law Rev. 583. See, also, 4 Harv. Law Rev. 306; post, p. 167. Cf. Keener, Quasi Contracts, 155 et seq.

⁹² *National Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513; *National Bank of Commerce in St. Louis v. Mechanics' American Nat. Bank*, 148 Mo. App. 1, 127 S. W. 429; *Title Guarantee & Trust Co. v. Haven*, 126 App. Div. 802, 111 N. Y. Supp. 305. See Negotiable Instruments Law, §§ 62, 185, 187-189. See, also, 14 Harv. Law Rev. 242. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-454*.

⁹³ Post, p. 169.

⁹⁴ *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *National Dredging Co. v. President, etc., of Farmers' Bank*, 6 Pennewill (Del.) 580, 69 Atl. 607, 16 L. R. A. (N. S.) 593, 130 Am. St. Rep. 158; *Chicago Savings Bank v. Block*, 126 Ill. App. 128; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529; *National Bank of Virginia v. Nolting*, 94 Va. 263, 26 S. E. 826; *Morris v. Beaumont Nat. Bank*, 37 Tex. Civ. App. 97, 83 S. W. 36.

Where plaintiff, intending to be absent, drew a postdated check,

in accordance with the rule formerly prevailing in America, it was the act of a stranger, nullifies the instrument. Nevertheless there is authority to the effect that, if the alteration was by raising the amount, the bank may charge the drawer for the original amount.⁹⁵ The Negotiable Instruments Law, following the English rule, provides in effect that the instrument is avoided by an alteration, even if it be the act of a stranger, but also provides that "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."⁹⁶ It would seem that this provision should operate to the benefit of the bank, as against the drawer, where it has paid a raised check to a holder in due course.

Same—Rights of Bank Against Payee

Where the bank has paid such altered check, it has been uniformly held in the United States that it may recover the amount from the party to whom payment was made, although he was a holder in good faith.⁹⁷ Such a case has been distin-

payable to his clerk, to be used if plaintiff did not sooner return, and the clerk altered the date to an earlier date, cashed the check, and absconded, the bank could not charge the drawer's account. *Crawford v. West Side Bank*, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-454.

⁹⁵ *Hall v. Fuller*, 5 B. & C. 750. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

⁹⁶ Section 124; ante, p. 136.

⁹⁷ *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455; *Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102; *Bank of Commerce v. Union Bank*, 3 N. Y. 236. See, also, *National City Bank of Brooklyn v. Westcott*, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771.

Where a raised check is deposited by the payee with a bank for collection, and is restrictively indorsed by it, without representation of ownership, and is paid by the drawee, and the funds are paid by the collecting bank to payee, the collecting bank cannot be

guished, not very successfully, from one of payment of a check on which the signature of the drawer was forged, on the ground that the drawee is supposed to know the signature of the drawer, but not the handwriting in the body of the bill, and that consequently, no negligence being imputable to the bank, provided the alteration is not manifest, the payee ought not in conscience to retain the money.⁹⁸ Where the alteration was in the amount, it has been held, upon equitable principles, that the bank could recover only the difference between the amount for which the check was drawn and the amount paid.⁹⁹

The holding that the bank may recover back the amount from the person receiving payment has been the same where the bank has paid a check which it had certified, both where the alteration was before the certification,¹⁰⁰ and where it

held liable by the drawee. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 148*; *Cent. Dig. §§ 438-452*.

⁹⁸ *Bank of Commerce v. Union Bank*, 3 N. Y. 230; ante, p. 165, note 91. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 148*; *Cent. Dig. §§ 438-452*.

⁹⁹ *Merchants' Bank of New York v. Exchange Bank of New Orleans*, 16 La. 457; *City Bank of Houston v. First Nat. Bank of Houston*, 45 Tex. 203. See, also, *National Bank of Commerce of New York v. National Mechanics' Banking Ass'n of New York*, 55 N. Y. 211, 14 Am. Rep. 232.

Under Negotiable Instruments Law, § 124, it would seem that, if the bank had paid a raised check to a holder who would be in a position to enforce it against the drawer according to its original tenor, the recovery of the bank should be limited to that amount. Ante, p. 167. See *Imperial Bank v. Bank of Hamilton* [1903] A. C. 49.

In order to be a holder in due course, the check must be regular on its face (section 52), and it is not so if the alteration is apparent. *Elias v. Whitney*, 50 Misc. Rep. 326, 98 N. Y. Supp. 667. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 148*; *Cent. Dig. §§ 438-452*.

¹⁰⁰ *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305; ante, p. 167. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 148*; *Cent. Dig. §§ 438-452*.

was made subsequently,¹⁰¹ provided the bank, in making the payment, has not been guilty of culpable negligence.¹⁰²

Same—Negligence Facilitating Alteration

Where a party to a negotiable instrument, seeking to defend on the ground of alteration, has by his negligence made the alteration possible—as where he has carelessly left spaces before or after the words or figures expressing the amount—it is held in many jurisdictions that he is liable on the instrument as altered to a bona fide purchaser, upon the ground that where one of two innocent persons must suffer, if one by his want of care has made the loss possible, the loss must fall upon him.¹⁰³ In other jurisdictions, the courts refuse to apply this doctrine to the case in question; for, it is said, the maker of the instrument owes no duty to a subsequent holder, and may rest on the presumption that it will not be criminally altered, and that a purchaser must be considered as taking the

¹⁰¹ National Bank of Commerce of New York v. National Mechanics' Banking Ass'n of New York, 55 N. Y. 211, 14 Am. Rep. 232. See "*Banks and Banking*," Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-452.

¹⁰² Continental Nat. Bank of New York v. Tradesmen's Nat. Bank, 36 App. Div. 112, 55 N. Y. Supp. 545.

Where defendant bank certified a draft, and afterwards was notified by the drawer that it had been lost, and not to pay it, and subsequently it was altered as to payee and amount, and plaintiff before purchasing it sent it to defendant to ascertain if the certification was good, and defendant's teller, without referring to the register of certified bills, stated that the certification was good, a judgment for plaintiff, resting on a finding of culpable negligence, was affirmed. Clews v. Bank of New York Nat. Banking Ass'n, 114 N. Y. 70, 20 N. E. 852. See, also, same case, 89 N. Y. 418, 42 Am. Rep. 303; 105 N. Y. 398, 11 N. E. 814. See "*Banks and Banking*," Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-452.

¹⁰³ Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120; Hackett v. First Nat. Bank, 114 Ky. 193, 70 S. W. 664; Isnard v. Torres, 10 La. Ann. 103; Capital Bank v. Armstrong, 62 Mo. 59; Brown v. Reed, 79 Pa. 370, 21 Am. Rep. 75. See "*Banks and Banking*," Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-452.

instrument at his own risk.¹⁰⁴ The question whether the drawer of a check which has been so altered is liable thereon to a bona fide holder will, of course, depend upon which of these two rules is adopted in the particular jurisdiction.

A different question is presented, however, as between the bank and a depositor who has so carelessly prepared a check that it can easily be raised without suspicion, when the bank has paid the altered check. It may properly be said that the depositor does owe a duty to the bank, which is bound at its peril to honor his checks. The leading case upon the general doctrine of negligence facilitating alteration (*Young v. Grote*),¹⁰⁵ decided in England in 1827, was such a case, and it was there held that a banker was not liable for a raised check, where he had been misled into paying it by such want of caution on the part of the drawer. The rule in *Young v. Grote* appears to be no longer the law in England;¹⁰⁶ but it has been followed recently in New York, where a different rule prevails as between the maker of a negotiable instrument and a bona fide purchaser,¹⁰⁷ upon the ground that a depositor owes a duty of care to the bank.¹⁰⁸ In jurisdictions where

¹⁰⁴ *Exchange Nat. Bank v. Bank of Little Rock*, 58 Fed. 140, 7 C. C. A. 111, 22 L. R. A. 686 (check); *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 892, 4 Am. St. Rep. 18 (check); *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *National Exchange Bank of Albany v. Lester*, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

¹⁰⁵ 4 Bing. 253. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

¹⁰⁶ *Colonial Bank of Australia v. Marshall*, 22 L. T. R. 746. See, also, *Scholfield v. Earl of Loundesborough* [1896] A. C. 514. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

¹⁰⁷ *National Exchange Bank of Albany v. Lester*, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

¹⁰⁸ *Timbel v. Garfield Nat. Bank*, 121 App. Div. 870, 106 N. Y.

the negligent maker or drawer of a negotiable instrument is held liable even to a bona fide holder, a fortiori would the negligent drawer of a check be liable to the bank which had been misled into payment.

Forged Indorsement—Rights of Bank Against Drawer

Where a bank on which a check is drawn has paid it to one who was not entitled to receive payment, because he was not the payee, or because of the forgery of the indorsement of the payee or of an indorsee, the payment is, of course, unauthorized, and the bank may not charge the payment to the account of the drawer,¹⁰⁹ unless the drawer was guilty of negligence

Supp. 497; *Trust Co. of America v. Conklin*, 65 Misc. Rep. 1, 119 N. Y. Supp. 367.

The drawer is not bound so to prepare the check that no one can successfully tamper with it. *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. See, also, *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

¹⁰⁹ *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; *First Nat. Bank of Chicago v. Pease*, 168 Ill. 40, 48 N. E. 160; *German Savings Bank of Davenport v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399; *Rice v. Citizens' Nat. Bank (Ky.)* 51 S. W. 454; *Winslow v. Everett Nat. Bank*, 171 Mass. 534, 51 N. E. 16; *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. (N. S.) 514, 126 Am. St. Rep. 467; *Harter v. Mechanics' Nat. Bank*, 63 N. J. Law, 578, 44 Atl. 715, 76 Am. St. Rep. 224; *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106; *Kearny v. Metropolitan Trust Co.*, 110 App. Div. 236, 97 N. Y. Supp. 274; *Id.*, 186 N. Y. 611, 79 N. E. 1108; *Gallo v. Brooklyn Savings Bank*, 199 N. Y. 222, 92 N. E. 633, 32 L. R. A. (N. S.) 66; *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79.

If, in accordance with methods of doing business through a clearing house, the drawee pays on a guaranty of the indorsement of the payee by a responsible bank, this does not affect the duty of the drawee to see that the indorsement is genuine. *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250.

The depositor cannot recover from the person who received payment as for moneys received for the depositor's use. *Tibby Bros.*

precluding him from setting up the forgery or want of authority,¹¹⁰ or by his subsequent conduct precludes himself from denying the right of the bank to make the charge, although this can seldom happen in the case of a forged indorsement.¹¹¹

Same—Rights of Bank Against Payee

Where the drawee has paid a check to one who had no title to it by reason of a forged indorsement, the bank may recover the money back from him.¹¹² Where the money has been paid to a collecting bank or other agent of such a holder, or of a holder of an altered check, if the agency was disclosed, as

Glass Co. v. Farmers' & Mechanics' Bank of Sharpsburg, 220 Pa. 1, 69 Atl. 280, 15 L. R. A. (N. S.) 519.

Where, after payment to a holder under a forged indorsement, the draft was returned to the drawer, who delivered it to the payee, and he demanded payment, which was refused, and the drawer then paid the draft after protest, he had a right of action against the bank. Citizens' Nat. Bank of Davenport v. Importers' & Traders' Bank of New York, 119 N. Y. 195, 23 N. E. 540. See "*Banks and Banking*," Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-452.

¹¹⁰ See cases in preceding note.

The burden is on the bank to show such negligence. Murphy v. Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595. Where the agent of the drawers of a check forged the payee's name and used the proceeds to settle a shortage in his account with the drawers, it was held that since the proceeds came back to the drawers, and the agent's debt to them remained unpaid, they had suffered no injury and could not recover from the drawee paying on the forged instrument. Andrews v. Northwestern Nat. Bank, 107 Minn. 196, 117 N. W. 621, 25 L. R. A. (N. S.) 996; post, p. 175. See "*Banks and Banking*," Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-452, 518, 519.

¹¹¹ Post, p. 175.

¹¹² Wellington Nat. Bank v. Robbins, 71 Kan. 748, 81 Pac. 487, 114 Am. St. Rep. 523; Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Oriental Bank v. Gallo, 112 App. Div. 360, 98 N. Y. Supp. 561; Second Nat. Bank of Pittsburg v. Guarantee Trust & Safe Deposit Co., 206 Pa. 616, 56 Atl. 72; Star Fire Ins. Co. v. New Hampshire Nat. Bank., 60 N. H. 442. See, also, Macbeth v. North & South Wales Bank, 24 L. T. R. 5, 397. See "*Banks and Banking*," Dec. Dig. (Key No.) § 147; Cent. Dig. §§ 438-452.

by an indorsement to the agent "for collection," the drawee's right of action is against the principal, and payment over by the agent before notice of the mistake is a defense;¹¹³ but if the agency was not disclosed, the right of action is against the agent, and he is liable, although he may have paid the money over to his principal.¹¹⁴

Same—Rights of True Holder

Where the drawee has so paid a check under a forged indorsement, the drawer, of course, still remains liable thereon to the true holder, whose indorsement was forged. Although the person who received payment was a bona fide purchaser of the check, he was nevertheless thereby guilty of a conversion, for which he was liable in damages to the true owner, and, having obtained the money by means of the check, he is liable to the true owner in an action for money had and received.¹¹⁵

Same—Fictitious Payee

The Negotiable Instruments Law provides that an instrument is payable to bearer "when it is payable to the order of

¹¹³ National Park Bank of New York v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612; National City Bank of Brooklyn v. Westcott, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771; United States v. American Exch. Nat. Bank (D. C.) 70 Fed. 232. See, also, Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169. See "*Banks and Banking*," Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-452.

¹¹⁴ First Nat. Bank of Minneapolis v. City National Bank, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637; Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287. See "*Banks and Banking*," Dec. Dig. (Key No.) § 147; Cent. Dig. §§ 438-452.

¹¹⁵ Bobbett v. Pinkett, 1 Ex. D. 368; Buckley v. Second Nat. Bank of Jersey City, 35 N. J. Law, 400, 10 Am. Rep. 249; Johnson v. First Nat. Bank of Hoboken, 6 Hun (N. Y.) 124; Salomon v. State Bank, 28 Misc. Rep. 324, 59 N. Y. Supp. 407; Ellery v. People's Bank (Sup.) 114 N. Y. Supp. 108; Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Knoxville Water Co. v. East Tennessee Nat. Bank (Tenn.) 131 S. W. 447. See "*Banks and Banking*," Dec. Dig. (Key No.) § 174; Cent. Dig. §§ 629-633; "*Bills and Notes*," Dec. Dig. (Key No.) § 381; Cent. Dig. §§ 994, 995.

a fictitious or nonexistent person, and such fact was known to the person making it so payable.”¹¹⁶ Under this provision, as formerly in this country,¹¹⁷ the intent of the drawer determines whether a check is payable to bearer, or requires the signature of the payee named, although he may be in fact, but unknown to the drawer, fictitious or nonexistent. Therefore, if the drawer does not actually intend that the payee named shall receive and be entitled to payment of the check, payment by the bank without his indorsement, or with an indorsement by another hand, is authorized, and the bank may charge the drawer.¹¹⁸ But if the drawer is induced to make a check to a payee therein named, intending payment to be made only to him or to his order, payment to any other per-

¹¹⁶ Negotiable Instruments Law, § 9 (3).

¹¹⁷ *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 635; *Shipman v. Bank of the State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821 (former statute); *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596 (former statute). See “*Bills and Notes*,” *Dec. Dig. (Key No.)* §§ 6, 60; *Cent. Dig.* §§ 8, 85-94.

¹¹⁸ *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780.

The name of the drawer of checks purporting to have been signed by an administrator, payable to beneficiaries of the estate entitled to greater amounts from the estate than the amounts payable, was forged. The checks were accepted and paid by the drawee to a bank with which they had been deposited, the names of the payees appearing as indorsed thereon. It did not appear who forged the drawer's name, but the person who did so knew that the payees would never have any interest in the checks. Held, that the drawee could not recover the money paid, since it was bound to know the signature of the drawer, and the payee was fictitious within the statute. *Trust Co. of America v. Hamilton Bank of New York*, 127 App. Div. 515, 112 N. Y. Supp. 84. See, also, *Bank of England v. Vagliano Bros.* [1891] A. Cas. 107. But see *First Nat. Bank of Chicago v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

son, even though no such person as the payee existed, is unauthorized.¹¹⁹

Same—Fraudulent Impersonation

Where an impostor fraudulently impersonates another person, and thereby induces a third person to draw a check, designating the payee by the name assumed by the impostor, and to deliver the check to him in the belief that the drawer is dealing with the person whose name has been assumed, and the impostor indorses the check in the assumed name, and the drawee bank in good faith pays it to him or to an indorsee, the bank is protected, and may charge the payment to the drawer.¹²⁰ And if the impostor transfers the check so indorsed to a bona fide purchaser, he takes title thereby and can hold the drawer.¹²¹ These cases cannot be explained on the ground that the payee is fictitious, since the check is not payable to the order of a fictitious person, to the knowledge of the drawer; nor on the ground of the drawer's negligence, since the holding is the same where he exercises all reasonable care.

¹¹⁹ *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250. See, also, *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. (N. S.) 514, 126 Am. St. Rep. 467. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-452*.

¹²⁰ *United States v. National Exchange Bank (C. C.)* 45 Fed. 163; *Meyer v. Indiana Nat. Bank*, 27 Ind. App. 354, 61 N. E. 596; *Hoffman v. American Exch. Nat. Bank*, 2 Neb. (Unof.) 217, 96 N. W. 112. See, also, *Metzger v. Franklin Bank*, 119 Ind. 359, 21 N. E. 973; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 11 Pac. 141, 57 Am. Rep. 171; *First Nat. Bank of Ft. Worth v. American Exch. Nat. Bank*, 170 N. Y. 88, 62 N. E. 1089.

Where the bank has paid to a purchaser, since the drawer had no claim against the bank, the bank had none against the purchaser. *Land Title & Trust Co. v. Northwestern Nat. Bank*, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 148; Cent. Dig. §§ 438-452*.

¹²¹ *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *Burrows v. Western Union Tel. Co.*, 86 Minn. 499, 90 N. W. 1111, 58 L. R. A. 433, 91 Am. St. Rep. 380; *Heavy v. Commercial Nat. Bank*, 27 Utah, 222, 75 Pac. 727, 101 Am. St. Rep. 966; *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. 165. See "*Banks*

The cases are usually explained on the ground that the person to whom the check is delivered, though designated by the name of another, is the person with whom the drawer is dealing and to whom he intends the check to be paid, so that in paying it the bank carries out his intention. This explanation is open to the criticism that, while the drawer does intend payment to be made to the person to whom he delivers the check, he also intends that it shall be made to the person impersonated; but, whatever the explanation, the courts, with one exception,¹²² have uniformly held that the drawer is in effect precluded from asserting a different intention than that attributed to him. The Negotiable Instruments Law provides: "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."¹²³ It seems clear that the cases under consideration fall within the above exception, and that the drawer is "precluded from setting up the forgery or want of authority," and it has been so held,¹²⁴ though not without dissent.¹²⁵

and Banking," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452; "Bills and Notes," *Dec. Dig. (Key No.)* §§ 373-377; *Cent. Dig.* §§ 952, 966-992.

¹²² *Tolman v. American Nat. Bank*, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

¹²³ Negotiable Instruments Law, § 23.

¹²⁴ *Hoffman v. American Exch. Nat. Bank*, 2 Neb. (Unof.) 217, 96 N. W. 112. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

¹²⁵ The contrary was held, both under this section and at common law, in *Tolman v. American Nat. Bank*, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850. See comments on this case by Dean James Barr Ames and Mr. Charles L. McKeenan, *Brannan, Neg. Inst. Law*, pp. 95, 125-131. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 438-452.

CHAPTER V

CLEARING HOUSES

- 46. Clearing House System.
- 47. Effect of Payment Through Clearing House.
- 48. Effect of Rules—Non-Members.
- 49. Clearing House Certificates.

CLEARING HOUSE SYSTEM

46. In commercial centers the adjustment and payment of daily balances between banks is usually effected by means of clearing house associations, of which the several banks are members, at the clearing house, or central office, of the association, where the representatives of the several banks meet daily, and where each bank turns in and is credited with all checks and cash demands which it holds against the other banks, and is charged with all such demands against itself turned in by the others, and where each bank pays or receives, as the case may be, the balance found to be owed by or due to it, subject to subsequent adjustment directly between the banks immediately concerned of items found not good.

In all large cities the adjustment and payment of daily balances between banks is effected through the clearing house, by means of associations formed for that purpose, of which the several banks are members. Under this system there is a meeting each morning at the central office or clearing house of the clerks representing the several banks, and each bank turns in all the checks and cash demands which it holds against the others and receives credit therefor, while it is charged with all checks and cash demands against itself turned in by the

other banks. The checks and demands which have thus been credited to and charged against each bank are then summed up, and the balance owed by or due to each, as the case may be, is then ascertained. At a later hour each bank pays to or receives from the clearing house the balance found to be against it or in its favor, and the total transactions are thus settled by the actual payment of a comparatively small amount of cash.¹ In this daily settlement of the clearing house no account is taken of the fact that checks may be bad; but all checks and drafts on any bank or notes payable at the bank are charged against it, though the accounts of the drawers of the checks or makers of the notes may not be good, and though the instruments may be forgeries. The adjustment of these items is usually effected, not through the clearing house, but directly between the bank which turned in any such paper and the bank on which it was drawn or at which it was payable.

The rules of all clearing house associations are by no means identical;² but the procedure outlined is that generally adopted.³ In substance, the system "substitutes a settlement made at a fixed place and time each day by representatives of all the members of the association in the place of a separate settlement by each bank with every other made over the counter."⁴

Clearing house associations are ordinarily merely voluntary associations entered into for the purpose of settling daily bal-

¹ See Dunbar, *Theory & Hist. of Banking*, 43, 52.

² See *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 26 Sup. Ct. 289, 50 L. Ed. 527; *Blaffer v. Louisiana Nat. Bank*, 35 La. Ann. 251. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 318, 320; *Cent. Dig.* §§ 1224, 1226.

³ See *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120; *Mt. Morris Bank v. Twenty-Third Ward Bank*, 172 N. Y. 244, 64 N. E. 810; *Philler v. Patterson*, 168 Pa. 468, 32 Atl. 26, 47 Am. St. Rep. 896. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

⁴ *Philler v. Patterson*, 168 Pa. 468, 32 Atl. 26, 47 Am. St. Rep. 896. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 318, 320; *Cent. Dig.* §§ 1224, 1226.

ances between the members.⁵ The associations are managed by a committee or other officers, as may be provided by the constitution and rules.⁶

EFFECT OF PAYMENT THROUGH CLEARING HOUSE

47. Where a rule provides that checks included in the clearing house settlement which are found not to be good shall be returned by the bank receiving them to the bank from which they were received, before a certain hour, the return of a check within such time is equivalent to a refusal to pay it. If a check be not returned within such time, the settlement becomes operative as payment, with the same effect as if payment had been made over the counter of the drawee bank; but in some jurisdictions it is held that if the drawee, because of its mistaken belief that the drawer's funds are sufficient, fails to return such check within such time, it may upon afterwards discovering its mistake return the check and require the other bank to refund the payment, unless the latter before notice of the mistake has changed its position, so that it would suffer loss if required to rectify the mistake.

⁵ See *Yardley v. Philler*, 167 U. S. 344, 17 Sup. Ct. 835, 42 L. Ed. 192.

Such an association, though it issue certificates for use in payment between its members, is not itself a bank. *Crane v. Fourth St. Nat. Bank*, 173 Pa. 566, 34 Atl. 296. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 318; *Cent. Dig.* § 1224.

⁶ See *Yardley v. Philler*, 167 U. S. 344, 17 Sup. Ct. 835, 42 L. Ed. 192.

The association is properly sued in the names of the committee having control of its business, funds, and securities. *Yardley v. Philler* (C. C.) 58 Fed. 746. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 318-320; *Cent. Dig.* §§ 1224-1226.

As already stated, in the settlement through the clearing house no account is taken of the fact that the checks may be bad, and the settlement of such checks or other items is effected directly between the drawee bank and the bank which presented the paper. Usually it is provided by the rules that checks which are found not good shall be returned by the banks receiving them to the banks from which they were received before a certain hour on the same day.⁷

If a check is returned within the time fixed by the rule, this is, of course, equivalent to a refusal to pay.⁸ On the other hand, if a check is not returned within the time so fixed, it would naturally follow that the settlement would become operative as payment, with the same effect as if payment had been made in cash over the counter of the bank. In this view such payment would not prevent the drawee bank, in the absence of special circumstances, from recovering back the money if the payment had been made under a forged indorsement,⁹ or if the check had been altered;¹⁰ but it would prevent a recovery from a bona fide holder if the mistake of the drawee

⁷ The rule of the New York clearing house that such items shall be returned the same day to the bank from which they were received, which shall immediately refund, is not repealed by a later provision that in case of the failure of the bank to refund the other bank may report the fact to the manager of the clearing house, who shall, with the approval of the committee, readjust the clearing house statement, and declare the correct balance between such banks, provided the report be made before 1 o'clock the same day. The bank which has been charged with such paper may seek reclamation directly from the other bank. *Mt. Morris Bank v. Twenty-Third Ward Bank*, 172 N. Y. 244, 64 N. E. 810. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 319, 320; *Cent. Dig.* §§ 1225, 1226.

⁸ *Fernandez v. Glynn*, 1 Camp. 426, note; *German Nat. Bank v. Farmers' Deposit Nat. Bank*, 118 Pa. 294, 12 Atl. 303. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

⁹ *Ante*, p. 172.

¹⁰ *Ante*, p. 167. See *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

had been in failing to discover that the signature of the drawer was forged,¹¹ unless the holder was one who by bad faith or misconduct had contributed to the success of the fraud or to the mistake.¹² Indeed, it has been held in Pennsylvania that a rule requiring checks "not good" to be returned before a designated hour applied only to checks not good because of the insufficiency of the drawer's funds.¹³

In the view that if a check be not returned within the time limited the settlement operates as payment, if the drawee bank failed to return within the time a check which was not good because of the insufficiency of the drawer's funds, no recovery on that ground could thereafter be had, even if the bank had failed to act under the mistaken belief that the funds were sufficient. This result logically follows, at least in those jurisdictions where it is held that, if the drawee bank pays a check in the mistaken belief that the drawer's funds are sufficient, it cannot afterwards correct the mistake and recover the amount from the payee upon the ground of a mistake of fact.¹⁴ In

¹¹ Ante, p. 161; *Commercial & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Baltimore*, 30 Md. 11, 96 Am. Dec. 554; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286.

So held, though the payee bank was not injured by the delay, under a clearing house rule that checks not returned before 2 o'clock should be deemed to have been paid with like effect as though paid in currency at that hour over the counter of the bank on which it was cleared. *National Bank of Commerce in St. Louis v. Mechanics' American Nat. Bank*, 148 Mo. App. 1, 127 S. W. 429. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

¹² *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

¹³ *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. 436; *Corn Exchange Nat. Bank v. National Bank of Republic*, 78 Pa. 233.

In these cases the drawer's signature was forged, and recovery by the drawee was allowed under a statute. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

¹⁴ Ante, p. 149.

The Chicago rule provided that checks "not found good are to be

Massachusetts and New York, however, it has been held that such a mistake may be corrected, although the check be not returned within the time limited, unless the bank which presented the check has changed its position before notice of the mistake, as by paying the amount over to an owner who had deposited the check for collection. The question in Massachusetts arose under the rules of the Boston clearing house which provided: "Whenever checks are sent through the clearing house which are not good, they shall be returned by the banks receiving the same, to the banks from which they were received, as soon as it shall be found that said checks are not good; and in no case shall they be retained after 1 o'clock." In a case where certain checks, having been discovered to be not good, were handed by the teller of the drawee bank at 12:45 p. m. to the messenger, with direction to return them and to collect the amounts from the banks from which they had been received, but owing to a mistake of the messenger as to the number of one of the checks he went to the wrong bank, in consequence of which the check was not returned to the proper bank until 1:07 p. m., it was held that the drawer bank could recover back the amount.¹⁵ The court said: "Under this arrangement, the payment * * * must be regarded as only provisional until the hour of 1 o'clock, to become complete only in case the check is not returned at that time. And if by any mistake of fact the return of the check is not then made, then,

returned the same day received, before 1:30 o'clock p. m., to the member from whom received, who shall immediately reimburse the holder of the same." At 1:42 p. m. the drawer discovered that the check was not good, and returned it at 2:15, and it was held that it could not recover back the amount. *Preston v. Canadian Bank of Commerce* (D. C.) 23 Fed. 179. See *Blaffer v. Louisiana Nat. Bank*, 35 La. Ann. 251. See, also, dissenting opinion of Ingraham, J., in *Citizens' Central Nat. Bank v. New Amsterdam Nat. Bank*, 128 App. Div. 554, 112 N. Y. Supp. 973. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

¹⁵ *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

as between the two banks, it is to be treated as payment made under a mistake of fact, precisely to the same extent, and with the same right to reclaim, which would have existed if the payment had been made by the simple act of passing the money across the counter directly to the payee on presentation of the check. The manifest purpose of the provision is to fix a time at which the creditor bank may be authorized to treat the check as paid, and be able to regulate its relations to other parties." To this general statement no exception can be taken, but in its application it is submitted that there was error, for the court declared that money paid to the holder of a check drawn without funds may be recovered back, if paid by the drawee under a mistake of fact, and that if the plaintiff had paid the check at its counter under such a mistake of fact it could have maintained the action. And in a later Massachusetts case¹⁶ the same rule was applied where the discovery of the mistake did not occur until after the hour for returning the check. "The rule," said the court, "authorizes the bank receiving the check, after 1 o'clock arrives and the check is not returned, to treat it in all transactions as if it were good. If, therefore, the bank changes its position, it will suffer no loss by reason of it. On the other hand, if the mistake is discovered after 1 o'clock, and the bank * * * has not changed its position by reason of the expiration of the time, it should rectify the mistake when reasonable care has been exercised by the bank on which it was

¹⁶ Merchants' Nat. Bank v. National Bank, 139 Mass. 513, 2 N. E. 89.

Where the bank paid without examination of the drawer's account, this was not payment under a mistake of fact, but simply laches, and the bank could not recover. *Boylston Nat. Bank v. Richardson*, 101 Mass. 287.

If the drawee bank fails to return a check within the time limited, knowing that the drawer's account is not good, though in the expectation that it will be made good, this is not a mistake of fact entitling it to recover. *Atlas Nat. Bank v. National Exch. Bank*, 176 Mass. 300, 57 N. E. 606. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

drawn." The question in New York was presented under a rule which provided: "Return of checks, drafts, etc., for informality, not good, missent, guarantee of indorsements or for any other cause, should be made before 3 o'clock of the same day." Where the plaintiff returned by its messenger a check found not good, but the check did not reach the other bank until a few minutes after the hour, it was held, following the Massachusetts cases, that the plaintiff could recover.¹⁷

EFFECT OF RULES—NON-MEMBERS

48. The members of a clearing house association may make such rules, as between themselves, for the conduct of their business, as they see fit; but such rules do not affect the rights of those who are not members, unless they contract with reference to the rules.

The members of a clearing house association may make such rules, as between themselves, for the conduct of their business, as they see fit.¹⁸ Such rules can, in general, have no effect upon rights of outsiders.¹⁹ To the regulations of the associa-

¹⁷ *Citizens' Central Nat. Bank v. New Amsterdam Nat. Bank*, 128 App. Div. 554, 112 N. Y. Supp. 973, affirmed 198 N. Y. 520, 92 N. E. 1080. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 320; *Cent. Dig.* § 1226.

¹⁸ *Atlas Nat. Bank v. National Exch. Bank*, 176 Mass. 300, 57 N. E. 605; *O'Brien v. Grant*, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361.

The members may bind themselves by rules governing, as between themselves, the effect of their indorsements. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 319; *Cent. Dig.* § 1225.

¹⁹ See *National Union Bank v. Earle* (C. C.) 93 Fed. 330.

The rules do not affect the relations between the payee of a check presented through the clearing house and the drawee. *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407.

Where a bank to which a draft had been indorsed "for collection"

tion the customers of the banks are not parties, and they are not in a situation to claim the benefit of them, nor are they liable to be affected by them.²⁰ A bank which is not a member may, however, employ a bank which is a member to clear for it, and when such a contract is entered into with reference to the rules the rights and obligations of the parties are subject to the rules.²¹ Thus where, in accordance with the rules of the New York clearing house, an agreement was made between a member and a non-member of the association, the latter depos-

was closed before the clearing house settlement was adjusted, and the drawee, a member, was called on by the clearing house to pay to it the amount of the draft, this was not payment of the draft. It was also singularly held that the owner could maintain an action against the drawee for the amount. *Crane v. Fourth St. Nat. Bank*, 173 Pa. 566, 34 Atl. 296.

The failure of a bank paying a check drawn by a depositor in favor of a third person, who forwards it through another bank for collection, to offer to return the check to the collecting bank and to demand repayment, within the time required by the rules of the clearing house, does not impair its right to recover the amount from the third person, provided its right to recover is otherwise perfect. *National Exchange Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. 1026, 33 L. R. A. (N. S.) 963. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 319, 321; *Cent. Dig.* §§ 1225, 1227.

²⁰ *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513, 2 N. E. 89. See, also, *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438, 37 Am. Rep. 376; *National Exch. Bank v. Eliot National Bank*, 132 Mass. 147; *Louisiana Ice Co. v. State Nat. Bank of New Orleans*, 1 McGloin (La.) 181; *Overman v. Hoboken City Bank*, 30 N. J. Law, 61; *Id.*, 31 N. J. Law, 563. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 319, 321; *Cent. Dig.* §§ 1225, 1227.

²¹ *Mt. Morris Bank v. Twenty-Third Ward Bank*, 60 App. Div. 205, 70 N. Y. Supp. 78; *Id.*, 172 N. Y. 244, 64 N. E. 810. See *Stuyvesant Bank v. National Mechanics' Bank*, 7 Lans. (N. Y.) 197.

The duty of a clearing house agent being only to collect through the clearing house, such agent is not negligent in failing to present a check at the counter of the drawee. *Farmers' & Mechanics' Bank of East Birmingham v. Third Nat. Bank*, 165 Pa. 500, 30 Atl. 1008. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 319, 321; *Cent. Dig.* §§ 1225, 1227.

iting money and bills receivable as collateral security, and a rule of the clearing house provided that such arrangements should not be discontinued without previous notice, which should not take effect until the completion of the clearings on the day after its receipt, it was held that the agreement was in effect a tripartite one between the two banks and the association, whereby not only the clearing house was secured as to its payments by the deposit, but the other members of the association were assured that all checks presented would be paid up to and including the day following the giving of such notice, and that the clearing member was required to pay checks on the non-member presented on the day after such notice, although it then knew that the non-member was insolvent; the security being applicable to the amount of the checks so paid.²²

²² O'Brien v. Grant, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361.

Where a similar contract existed between a member and a non-member bank, and depositors of the non-member, learning of its insolvency, drew checks on it, which were presented through the clearing house and paid by the member with knowledge that the superintendent of banks had taken possession of the non-member the day before, the member was nevertheless entitled to bills receivable deposited as security to reimburse itself for the checks paid. Davenport v. National Bank of Commerce, 127 App. Div. 391, 112 N. Y. Supp. 291, affirmed 194 N. Y. 568, 88 N. E. 1117.

Where a member bank, which had contracted with a non-member to pay checks drawn on the latter, and was secured by a deposit of collateral security, paid such a check presented through the clearing house, and the next day the drawee was declared insolvent, the former did not stand in the shoes of the drawee, so as to be entitled to demand from the drawer only the difference between his deposit in the drawee bank and the amount paid, but had the rights of a holder of the check, and was entitled (the security having been exhausted) to recover from the drawer the full amount paid. Grant v. MacNutt, 12 Misc. Rep. 20, 33 N. Y. Supp. 62.

A bank which, in payment of a clearing house check drawn in its favor as a result of the day's clearings, received the proceeds of checks presented to another member on the next morning before suspending payment, must account to the bankrupt estate of the defaulting member. Rector v. City Deposit Bank Co., 200 U. S. 405, 26 Sup. Ct. 289, 50 L. Ed. 527. See, also, Rector v. Commercial Nat. Bank,

CLEARING HOUSE CERTIFICATES

49. When the rules of an association so provide, it may issue to its members clearing house certificates, secured by a deposit of money or other assets by the bank to whom the certificates may be issued, to be used in lieu of money in payments between the members.

Frequently the rules of an association provide for the use of clearing house certificates in payments between members; the certificates being issued to members and being secured by a deposit of money or bills receivable or other assets of the bank to which they are issued.²³ The certificates are payable on demand, and made in convenient denominations for their use in payment. Such certificates are more commonly issued in times of panic or stringency, in order to create, to the extent of the certificates, solidarity of responsibility between the banks, each of which is liable in case of default in their payment, thus fortifying the credit of one by the credit of all; while the certificates also afford a means by which a bank with assets which are good, but which at such a time are not readily convertible into money, can use them in order to obtain what for banking purposes is the equivalent of cash.²⁴ It has been held that the pledge of securities for this purpose is not in violation of

200 U. S. 420, 26 Sup. Ct. 294, 50 L. Ed. 533; *Yardley v. Philler*, 167 U. S. 344, 17 Sup. Ct. 835, 42 L. Ed. 192.

Such payments are not within the prohibition of an act against payment by insolvent corporations made with intent to prefer creditors. *O'Brien v. Grant*, supra. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 319, 321; *Cent. Dig.* §§ 1225, 1227.

²³ *Philler v. Patterson*, 168 Pa. 468, 32 Atl. 26, 47 Am. St. Rep. 896. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 320, 322; *Cent. Dig.* §§ 1226, 1228.

²⁴ *Yardley v. Philler*, 167 U. S. 344, 17 Sup. Ct. 835, 42 L. Ed. 192. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 320, 322; *Cent. Dig.* §§ 1226, 1228.

the laws relating to national banks.²⁵ When bills or notes are so deposited with an association or its committee, it becomes a holder for value, and is not affected by equities existing between the original parties of which it has not notice.²⁶

²⁵ *Philler v. Patterson*, 168 Pa. 468, 32 Atl. 26, 47 Am. St. Rep. 896.

For the purpose of reserve, clearing house certificates, representing specie or lawful money deposited for that purpose, are recognized by the national banking laws. Rev. St. U. S. § 5192 (U. S. Comp. St. 1901, p. 3487).

A preference was not created, within a statute inhibiting assignments and contracts by a bank in contemplation of insolvency except for the benefit of all creditors and stockholders, where a bank accepted clearing house certificates, gave its notes for their amounts, and deposited collaterals as security. *Booth v. Atlanta Clearing House Ass'n*, 132 Ga. 100, 63 S. E. 907. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 322; *Cent. Dig.* § 1228.

²⁶ *Philler v. Patterson*, 168 Pa. 468, 32 Atl. 26, 47 Am. St. Rep. 896.

A note so deposited is not, in the hands of the committee, subject to set-off by the maker of any sum due him from the bank. *Philler v. Jewett*, 166 Pa. 456, 31 Atl. 204. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 320, 322; *Cent. Dig.* §§ 1226, 1228.

CHAPTER VI

COLLECTIONS

50. Relation Between Depositor for Collection and Bank.
51. Duties of Bank in Making Collection.
52. Rights and Liabilities as to Proceeds of Collection—Relation of Bank to Customer.
53. Insolvency of Bank.
54. Bank's Lien.
55. Collection by Correspondent Bank—Relation Between Depositor and Depositary and Collecting Banks.
56. Set-Off of Collecting Bank Against Forwarding Bank.
57. Lien of Collecting Bank.

RELATION BETWEEN DEPOSITOR FOR COLLECTION AND BANK

50. Where a paper is deposited with a bank for collection, the relation between the depositor and the bank is that of principal and agent until collection; but when the collection has been made, unless it be otherwise agreed, by weight of authority, the bank becomes a debtor to the depositor for the amount collected.

In General

Although the business of collecting commercial paper is not confined to banks, the transaction, when the collection is by a bank, usually involves the crediting of the proceeds of the collection to the deposit account of the customer, so that collecting is closely connected with the business of banking and is engaged in by all commercial banks. The power to collect commercial paper is implied under a charter to do a general banking business.¹

¹ Branch Bank of State at Montgomery v. Knox, 1 Ala. 148; First Nat. Bank v. First Nat. Bank of Newport, 116 Ala. 520, 22 South. 976; Keyes v. Bank of Hardin, 52 Mo. App. 323.

Collecting commercial paper is part of the regular business of a

The transaction is presented in its simplest form when the depositary bank is situated in the same place where the paper is to be presented for payment and collected. The transaction is more complicated when the paper is to be presented at another place, since then the depositary bank must forward the paper to an agent, usually another bank, for collection at that place, and it becomes necessary to consider, not merely the relation of the customer with the depositary bank, but also his relation with the collecting bank, and its relation with the forwarding or depositary bank. The measure of the responsibility of the depositary bank in such cases, as will appear, differs in different jurisdictions.² Often, moreover, the depositary bank, not having a correspondent at the place of presentment, sends the paper to a correspondent elsewhere, which in turn sends the paper to a correspondent of its own at the place of presentment, or if it has no correspondent there sends the paper to still another bank, which has a correspondent at the place of collection.³ So far as concerns the duties of the collecting bank, however, in the mere matter of making the collection, the same considerations apply, whether it be the depositary bank, or a bank to which the paper has been forwarded by that bank, or an intervening bank for collection.

Relation Between Bank and Depositor for Collection

As already explained, the relation between the holder of paper who deposits it with a bank for collection and the bank is that of principal and agent.⁴ And this is true, whether by the form of his indorsement, as an indorsement "for collection," the depositor simply constitutes the bank his agent for that purpose,⁵ or whether, although the indorsement by its form invests the bank with the title to the paper, an agency or trust is otherwise created by the understanding of the parties.⁶ In either

national bank. *Mound City P. & O. Co. v. Commercial Nat. Bank*, 4 Utah, 353, 9 Pac. 709. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 157; *Cent. Dig.* §§ 539, 540, 545, 546.

² Post, p. 204.

⁴ Ante, p. 28.

⁶ Ante, p. 31.

³ Post, p. 219.

⁵ Ante, p. 29.

case, subject to the bank's lien,⁷ if any, and subject to the rights of holders in due course if the paper was unrestrictively indorsed,⁸ the depositor can terminate the agency and withdraw the paper from the bank at any time before collection has been made.⁹ When the collection has once been made, however, unless it be otherwise agreed, the relation changes, and the bank becomes the debtor of the customer for the proceeds.¹⁰

Note Payable at Bank

The fact that a note is made payable at a particular bank does not, of course, constitute the bank the holder's agent to collect it.¹¹ If the maker deposits money in the bank to be applied in payment, the note not having been left in the bank for collection, the bank receives the money as agent of the debtor, and the deposit does not constitute payment.¹² But if the holder deposits the note in the bank for collection, the bank becomes his agent to receive payment.¹³ It follows that if the maker deposits money for payment of the note, and the holder

⁷ Post, p. 210.

⁸ Ante, p. 32.

⁹ Ante, pp. 30, 33.

¹⁰ Ante, p. 31; post, p. 205.

¹¹ Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207; Bloomer v. Dau, 122 Mich. 522, 81 N. W. 331. See "*Banks and Banking*," Dec. Dig. (Key No.) § 158; Cent. Dig. §§ 542-546.

¹² Bloomer v. Dau, 122 Mich. 522, 81 N. W. 331; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189; Adams v. Hackensack Imp. Commission, 44 N. J. Law, 638, 43 Am. Rep. 406.

Though the note is in the manual possession of the bank, if it has not been deposited for collection the bank is not the agent of the holder to receive payment, and money deposited by the payor to meet the note does not constitute payment, but remains his own property. Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818. See "*Banks and Banking*," Dec. Dig. (Key No.) § 156; Cent. Dig. §§ 539-546.

¹³ Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207; Smith v. Essex County Bank, 22 Barb. (N. Y.) 627; Blakeslee v. Hewitt, 76 Wis. 341, 44 N. W. 1105. See "*Banks and Banking*," Dec. Dig. (Key No.) § 156; Cent. Dig. §§ 539-546.

afterwards deposits the note for collection, the transaction operates as payment when the bank applies the money to payment of the note.¹⁴

DUTIES OF BANK IN MAKING COLLECTION

51. When the paper must be collected at a different place from that in which the depositary bank is situated, it is its duty to forward the paper to a bank or other agent at the place of presentment to make the collection. It is the duty of the collecting bank, whether it be the depositary bank or another, to exercise reasonable diligence and care in obtaining payment of the paper, and in securing the rights of the owner against any drawer or indorser who may be secondarily liable thereon by duly causing presentment to be made, notice of dishonor to be given, and protest to be made, as well as to follow the instructions of its principal and to exercise good faith. For any loss resulting to its principal from its failure to perform such duty the bank is liable.

In General

In general, it is the duty of an agent to exercise in the performance of his agency such reasonable skill, care, and diligence as the nature of his undertaking demands. A bank intrusted with the actual collection of commercial paper, whether it be the depositary bank or a bank at the place of collection,

¹⁴ If the money and the note are received before maturity, and the bank fails after maturity without having applied the money, the loss falls on the maker. *Sutherland v. First Nat. Bank of Ypsilanti*, 31 Mich. 230. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 166; *Cent. Dig.* §§ 574-578, 586.

to which the paper has been forwarded for that purpose by the depositary bank, must take all requisite steps to obtain payment and to secure and preserve the rights of its customer against the various parties to the instrument, and it must therefore make due presentment for acceptance and for payment, as the case may be, and if acceptance or payment be refused it must cause due notice of dishonor to be given to the drawer and indorsers, if any, and the instrument to be protested if it be one requiring protest.¹⁵ For any loss resulting to the customer from its failure to perform these duties the bank is liable. Ordinary care and reasonable diligence is the general measure of responsibility. If, owing to the lack of clear judicial precedent or of any uniform practice, the proper course to be pursued is uncertain, the bank is protected if it acts prudently and exercises reasonable knowledge and skill.¹⁶

While banks sometimes make a charge for collection, ordinarily the business is undertaken without charge; the inducement or consideration to the bank being the deposits which may result from the collection and the advantages to be derived from the business connection. In such cases the agency is not to be regarded as gratuitous, or at any rate the bank's

¹⁵ *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722; *Ft. Dearborn Nat. Bank v. Security Bank*, 87 Minn. 81, 91 N. W. 257; *Capitol State Bank v. Lane*, 52 Miss. 677; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Kirkham v. Bank of America*, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714; *Mound City Paint Co. v. Commercial Nat. Bank*, 4 Utah, 353, 9 Pac. 709.

It is not the bank's duty, without instructions, to bring suit where payment is refused. *Crow v. Mechanics' & Traders' Bank*, 12 La. Ann. 692; *Freeman v. Citizens' Nat. Bank*, 78 Iowa, 150, 42 N. W. 632, 4 L. R. A. 422. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 157, 171, 172; *Cent. Dig.* §§ 539-546, 597-628.

¹⁶ *Mechanics' Bank at Baltimore v. Merchants' Bank at Boston*, 6 Metc. (Mass.) 13; *Morris v. Union Nat. Bank*, 13 S. D. 329, 83 N. W. 252, 50 L. R. A. 182. See, also, *Haddock v. Citizens' Nat. Bank*, 53 Iowa, 542, 5 N. W. 766. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 171; *Cent. Dig.* §§ 597-618.

responsibility is not affected by the fact that no direct compensation is received.¹⁷

Presentment

It is the duty of a collecting bank to make due presentment for acceptance or for payment, as the case may be, of paper intrusted to it for collection. Presentment for payment, and in certain cases presentment for acceptance, unless waived or otherwise excused,¹⁸ are requisite, in order to preserve the rights of the holder against parties secondarily liable; and if by failure to make due presentment the holder suffers loss, by the consequent discharge of a drawer or indorser or otherwise, the bank is liable therefor.¹⁹ A discussion of the rules of law governing the presentment of bills of exchange and promissory notes for acceptance and for payment is beyond the scope of this book, and the reader is referred to the works upon negotiable instruments and to the provisions of the Negotiable Instruments Law,²⁰ which is now in force in most jurisdictions.

¹⁷ See *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722; *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; *Titus v. Mechanics' Nat. Bank at Trenton*, 35 N. J. Law, 588; *Kershaw v. Ladd*, 34 Or. 375, 56 Pac. 402, 44 L. R. A. 236. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156, 171; *Cent. Dig.* §§ 539-546, 597-618.

¹⁸ See Negotiable Instruments Law, §§ 79-82, 148.

¹⁹ *Bank of Washington v. Triplett*, 1 Pet. 25, 7 L. Ed. 37; *Jefferson County Savings Bank v. Hendrix*, 147 Ala. 670, 39 South. 295, 1 L. R. A. (N. S.) 246; *Tyson v. State Bank of Indiana*, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139; *McKinster v. Bank of Utica*, 9 Wend. (N. Y.) 46; *First Nat. Bank v. Moore*, 6 Ohio Dec. 779; *Bank of Delaware County v. Broomhall*, 38 Pa. 135, 80 Am. Dec. 471. See cases cited *supra*, note 15. If the paper would not have been paid if presented promptly, and there are no persons secondarily liable who are discharged by the delay, the bank is not liable. *Crouse v. First Nat. Bank of Penn Yan*, 137 N. Y. 383, 33 N. E. 301. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

²⁰ See sections 70-88 (for payment); sections 143-151 (for acceptance).

It is to be observed, however, that a collecting bank may fall short of the measure of diligence which it owes to its customer, notwithstanding that it observes the full degree of diligence which is sufficient to enable the holder of a bill or a note to charge a drawer and the indorsers. For example, the drawer of a sight draft would ordinarily be charged if it were presented by a collecting bank the day after its receipt;²¹ but if the bank had information that the drawer was in failing circumstances, and that the draft would not be paid unless presented at once, it would be the duty of the bank to present it, if possible, on the day of its receipt.²² Again, while it is not necessary, in order to charge the drawer of a bill payable at a day certain, to present it for acceptance, and he is chargeable, provided it be presented for payment on the day it falls due, it is nevertheless for the interest of the holder to have it presented for acceptance, so that he may have the assurance that the drawee will pay it, and otherwise have immediate recourse to the drawer, and consequently it is held that it is the duty of a collecting bank to present such a bill for acceptance, and that the bank is chargeable with negligence if it fails to do so.²³

Sending Paper to Drawee or Debtor

In some cases it has been held that a bank makes due presentment where it mails paper intrusted to it for collection directly to a bank on which it is drawn or by which it is payable.²⁴ This is usually justified on the ground of usage. By

²¹ *Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

²² See *First Nat. Bank of Meadville, Pa., v. Fourth Nat. Bank of New York*, 77 N. Y. 320, 33 Am. Rep. 618; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012, 32 L. R. A. (N. S.) 987. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

²³ See *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

²⁴ *Ante*, p. 113.

the better rule, however, the bank does not perform its duty where it attempts to collect in this way, and is responsible for any loss resulting thereby,²⁵ unless it appears that the holder has assented to this procedure being followed.²⁶

Notice of Dishonor

Where a negotiable instrument has been dishonored, either by nonacceptance or by nonpayment, notice of dishonor must be given, as a rule, to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.²⁷ For any negligence in failing to give notice of dishonor the collecting bank is answerable.²⁸

²⁵ *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. 967, 6 C. C. A. 183; *Farley Nat. Bank v. Pollock*, 145 Ala. 321, 39 South. 612, 2 L. R. A. (N. S.) 194, 117 Am. St. Rep. 44 (custom so authorizing void); *German Nat. Bank v. Burns*, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247; *Drovers' Nat. Bank v. Anglo-American Packing & Prov. Co.*, 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855; *Minneapolis Sash & D. Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609 (notwithstanding usage); *Bank of Rocky Mount v. Floyd*, 142 N. C. 187, 55 S. E. 95; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; *Wagner v. Crook*, 167 Pa. 259, 31 Atl. 576, 46 Am. St. Rep. 672; *Givan v. Bank of Alexandria (Tenn.)* 52 S. W. 923; *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441; *First Nat. Bank v. City Nat. Bank (Tex. Civ. App.)* 34 S. W. 458; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012, 32 L. R. A. (N. S.) 987. But see *Indig v. National City Bank of Brooklyn*, 80 N. Y. 100. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 163, 171, 172; *Cent. Dig.* §§ 567-570, 597-628.

²⁶ *First Nat. Bank v. Bank of Whittier*, 221 Ill. 319, 77 N. E. 563; *First Nat. Bank of Chicago v. Citizens' Sav. Bank*, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

²⁷ *Negotiable Instruments Law*, § 89.

²⁸ *Bird v. Louisiana State Bank*, 93 U. S. 96, 23 L. Ed. 818; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Chapman v. McCrea*, 63 Ind. 360; *Exchange Bank of Wheeling v. Sutton Bank*, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; *Borup v. Nininger*, 5 Minn. 523 (Gil. 417); *West v. St. Paul Nat. Bank*, 54 Minn. 466, 56 N. W.

Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal, and the principal may then give notice to the parties liable thereon.²⁹ It follows that if the bank, as agent for collection of the holder, gives notice to its customer or principal, and the principal himself gives notice to the parties secondarily liable, the rights of the principal have been preserved. In some cases it has been held or intimated that it is the duty of the bank to cause notice to be given to all parties who may be secondarily liable;³⁰ but by weight of authority this is not necessary, and the bank discharges its duty sufficiently by causing notice of dishonor to be given to the principal, leaving him to give notice to the drawer and indorsers.³¹

In giving notice, the bank must conform to the requirements of the law merchant in respect to the form, time, and manner of giving the notice. Notice of dishonor may, however, be waived, and in certain cases is dispensed with, and in some cases delay in giving notice is excused;³² and the rules which in such cases operate for the benefit of the holder would, of

54; *Walker v. Bank*, 9 N. Y. 582; *Bank of New Hanover v. Kenan*, 76 N. C. 340; *City Nat. Bank of Dayton v. Clinton County Nat. Bank of Wilmington*, 49 Ohio St. 351, 30 N. E. 958. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

²⁹ Negotiable Instruments Law, § 94.

³⁰ See *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330, 34 Am. Dec. 59; *Jagger v. National German-Am. Bank*, 53 Minn. 386, 55 N. W. 545; *President, etc., of Bank of Utica v. Smedes*, 3 Cow. (N. Y.) 662; *West Branch Bank v. Fulmer*, 3 Pa. 399, 45 Am. Dec. 651. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

³¹ *United States Bank v. Goddard*, Fed. Cas. No. 917, 5 Mason, 366; *Codrington v. Adams*, Fed. Cas. No. 2,937; *Phipps v. President, etc., of Millbury Bank*, 8 Metc. (Mass.) 79; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. 239; *State Bank of Troy v. Bank of the Capitol*, 41 Barb. (N. Y.) 343. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

³² Negotiable Instruments Law, §§ 109-115.

course, operate also for the benefit of the bank. A discussion of the law on the general subject of notice of dishonor is beyond the scope of this book. It is formulated in the Negotiable Instruments Law.³³

Protest

Where a foreign bill of exchange is dishonored by nonacceptance or by nonpayment, as the case may be, it must be duly protested, unless protest be waived³⁴ or dispensed with,³⁵ or else the drawer or indorsers are discharged.³⁶ In case of such dishonor, the collecting bank is, of course, charged with the duty of taking proper steps to have the paper protested, and if it fails to do so it will be liable for any consequent loss.³⁷

Liability of Collecting Bank for Default of Notary

Whether a collecting bank is responsible for the acts and defaults of a notary employed by it to protest paper is a question on which the cases conflict. In jurisdictions where a depository bank is responsible only for due care in selecting at another point a collecting bank, it is generally held that a bank is responsible only for due care in selecting a notary.³⁸ On

³³ Negotiable Instruments Law, §§ 89-118.

³⁴ Negotiable Instruments Law, § 111.

³⁵ Negotiable Instruments Law, § 159.

³⁶ Negotiable Instruments Law, §§ 118, 152.

For the formalities of protest, see Negotiable Instruments Law, §§ 153-160.

³⁷ See cases cited *supra*, note 15.

³⁸ *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Bowling v. Arthur*, 34 Miss. 41; *Bellemire v. Bank of United States*, 4 Whart. (Pa.) 105, 33 Am. Dec. 46; *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691; *Stacy v. Dane County Bank*, 12 Wis. 629.

An exception arises where the notary is a bank officer. *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. 239. See, also, *Gerhart v. Boatmen's Sav. Inst.*, 38 Mo. 60, 90 Am. Dec. 407 (notary in employ of bank under bond). Contra: *First Nat. Bank of Man-*

the other hand, in jurisdictions where the depositary bank is held responsible for the acts and defaults of its correspondent bank, while it is held by some of the courts that the same responsibility attaches for the acts of a notary,³⁹ other courts distinguish a notary from a collecting bank, on the ground that a notary is a public officer, and consequently hold that the bank is responsible only for due care in his selection.⁴⁰

Conflict of Laws

Where a bill or a note is drawn or indorsed in one place, and is to be presented for payment in another, the formality in respect to the manner of presentment,⁴¹ notice of dishonor,⁴²

ning v. German Bank of Carroll County, 107 Iowa, 543, 78 N. W. 195, 44 L. R. A. 133, 70 Am. St. Rep. 216 (even if notary was assistant cashier of bank). And see May v. Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154.

Liability of depositary bank for default of correspondent, post, p. 212. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 171, 172; Cent. Dig. §§ 597-628.

³⁹ Davey v. Jones, 42 N. J. Law, 28, 36 Am. Rep. 505; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Hitchcock v. Bank of Suspension Bridge, 57 App. Div. 458, 68 N. Y. Supp. 234. So also in Kansas. Bank of Lindsborg v. Ober & Hageman, 31 Kan. 599, 3 Pac. 324. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 171, 172; Cent. Dig. §§ 597-628.

⁴⁰ Britton v. Nicolls, 104 U. S. 757, 26 L. Ed. 917 (distinguished in Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722); First Nat. Bank of Gallipolis v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94; Thompson v. Bank of State of South Carolina, 3 Hill (S. C.) 77, 30 Am. Dec. 354. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 171, 172; Cent. Dig. §§ 597-628.

⁴¹ Rothschild v. Currie, 1 Q. B. 43; Pierce v. Insdeth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254; Todd v. Neal's Adm'r, 49 Ala. 266; McClane v. Fitch, 4 B. Mon. (Ky.) 600; Snow v. Perkins, 2 Mich. 238; Ellis v. Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63. See "*Bills and Notes*," Dec. Dig. (Key No.) § 386; Cent. Dig. §§ 1051-1054.

⁴² Rothschild v. Currie, 1 Q. B. 43; Hirschfeld v. Smith, L. R. 1 C. P. 340; Rouquette v. Overmann, L. R. 10 Q. B. 525; Todd v. Neal's Adm'r, 49 Ala. 266; Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867. Contra: Snow v. Perkins, 2 Mich. 238; Aymar v.

and protest ⁴³ is in general governed by the law of the place of payment, and not of the place where the instrument was drawn or indorsed. It follows that a bank to which a bill or a note is sent for collection discharges its duty if it conforms to the rules of the local law in these respects, unless it is instructed to follow a different course.⁴⁴

Instructions

It is the duty of the bank to follow any instructions which the customer may give in respect to the collection or remittance, and if the bank fails so to do it will be liable for any resulting loss.⁴⁵ If the paper is forwarded by the depositing bank to another bank for collection, it is the duty of the depositary to communicate the instructions to the collecting bank.⁴⁶

Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; *Lee v. Selleck*, 33 N. Y. 615 (but see *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614). See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 386; *Cent. Dig.* §§ 1051-1054.

⁴³ *Townsley v. Sumrall*, 2 Pet. 170, 7 L. Ed. 386; *Chatham Bank v. Allison*, 15 Iowa, 357; *Ellis v. Bank*, 7 How. (Miss.) 294, 40 Am. Dec. 63; *Simpson v. White*, 40 N. H. 540; *Carter v. Union Bank*, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89.

A drawer of a bill is discharged by failure to protest, where protest is required by the law of the place where the bill is drawn, though protest be not required by the law of the place where the bill is payable. *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 386; *Cent. Dig.* §§ 1051-1054.

⁴⁴ See *Morse*, *Banks & B.* (4th Ed.) § 220.

⁴⁵ *Milwaukee National Bank v. City Bank*, 103 U. S. 668, 26 L. Ed. 417; *Central Georgia Bank v. Cleveland Nat. Bank*, 59 Ga. 667; *Lord v. Hingham Nat. Bank*, 186 Mass. 161, 71 N. E. 312; *Finch v. Karste*, 97 Mich. 20, 56 N. W. 123; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, 82 N. W. 102; *First Nat. Bank of Texarkana v. Munzesheimer* (Tex. Civ. App.) 26 S. W. 428. See *Long v. Bank of Commerce* (Ky.) 38 S. W. 886. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 171, 172; *Cent. Dig.* §§ 554-564, 597-628.

⁴⁶ *Borup v. Nininger*, 5 Minn. 523 (Gil. 417). See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 171, 172; *Cent. Dig.* §§ 554-564, 597-628.

Good Faith—Securing Priority

It is the duty of a collecting bank to exercise good faith and loyalty towards its customer in the business intrusted to it. It has been held, however, that this duty does not prevent a bank which holds a claim against the drawee of a draft placed in its hands for collection, where it has not been instructed to bring suit, from securing priority of its own claim by attachment;⁴⁷ and this, although it fails to obtain security for the customer's claim, provided it makes due presentment and is guilty of no misrepresentation or fraudulent concealment.⁴⁸ But where the bank is instructed to place the claim in the hands of attorneys for suit, and fails to do so until it has secured its own claim, it is liable for any resulting loss.⁴⁹ So, where the bank grants time to the debtor, without communicating with its customer, and in the meantime secures a preference.⁵⁰

Medium of Payment

Authority to collect means authority to receive payment in legal currency; that is, in legal tender or what is by common consent tendered and passes as such at par.⁵¹ Unless specially authorized to do so, a collecting bank may not receive in pay-

⁴⁷ *Freeman v. Citizens' Nat. Bank*, 78 Iowa, 150, 42 N. W. 632, 4 L. R. A. 422. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

⁴⁸ *United States Bank v. Westervelt*, 55 Neb. 424, 75 N. W. 857. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 157, 171, 172; *Cent. Dig.* §§ 539-546, 597-628.

⁴⁹ *Finch v. Karste*, 97 Mich. 20, 56 N. W. 123. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

⁵⁰ *Dern v. Kellogg*, 54 Neb. 560, 74 N. W. 844. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

⁵¹ *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 49 S. W. 494; *Whipple v. Walker*, 2 Thomp. & C. (N. Y.) 456. See cases generally cited under this paragraph. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 162, 171, 172; *Cent. Dig.* §§ 554-566, 597-628.

ment a bill or a note,⁵² or a check, even if it be certified.⁵³ If a bank accepts a check in lieu of payment of paper intrusted to it for collection, it assumes the risk of payment of the check, and is liable for any resulting loss.⁵⁴ A usage of banks in collecting drafts to surrender them to the drawees on receiving checks for payment has been held unreasonable.⁵⁵ But the

⁵² *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. 265. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 162, 171, 172; *Cent. Dig.* §§ 554-566, 597-628.

⁵³ *Essex County Nat. Bank v. Bank of Montreal*, Fed. Cas. No. 4,532, 7 Biss. 193; *German-American Bank v. Third Nat. Bank*, Fed. Cas. No. 5,359; *Levi v. National Bank of Missouri*, Fed. Cas. No. 8,289, 5 Dill. 104. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 162, 171, 172; *Cent. Dig.* §§ 554-566, 597-628.

⁵⁴ *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; *National Bank of Commerce v. American Exch. Bank*, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527; *Landa v. Traders' Bank of Kansas City*, 118 Mo. App. 356, 94 S. W. 770; *Fifth Nat. Bank v. Ashworth*, 123 Pa. 212, 16 Atl. 596, 2 L. R. A. 491 (cashier's check). See, also, *Morris v. Enfaula Nat. Bank*, 106 Ala. 383, 18 South. 11.

In some cases it seems to be intimated that, notwithstanding the check is dishonored, if the bank used the utmost diligence in presenting it, and upon its dishonor reclaims it in sufficient time to take the necessary steps to charge any parties secondarily liable on the paper for which the check was given, the bank is guilty of no negligence. See *First Nat. Bank of Meadville, Pa., v. Fourth Nat. Bank of New York*, 77 N. Y. 320, 33 Am. Rep. 618 (cf. *Kirkham v. Bank of America*, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714); *Comer v. Dafour*, 95 Ga. 376, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167; *Anderson v. Gill*, 79 Md. 312, 29 Atl. 527, 25 L. R. A. 200, 47 Am. St. Rep. 402.

Where the bank receives in payment of a draft the drawee's check, but sends the draft with the check to the drawee bank, to be delivered on payment of the check, and the check is not paid, nor the draft delivered, the bank is not liable. *Second Nat. Bank of Columbia v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 162, 171, 172; *Cent. Dig.* §§ 554-566, 597-628.

⁵⁵ *National Bank of Commerce v. American Exch. Bank*, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527. See, also, *Noble v. Doughten*,

bank may receive payment by a check drawn on itself by a debtor who has a sufficient deposit, since the bank need not go through the form of paying to the debtor the money and receiving it back.⁵⁶ So it has been held that the bank may accept in payment its own certificate of deposit.⁵⁷ It is not within the authority of the bank to receive partial payment.⁵⁸

Surrender of Attached Bills of Lading

Where a bank receives for collection, without special instructions, a time draft with an attached bill of lading, even if it makes the goods deliverable to the order of the consignor, it has been held that the bank may surrender the bill of lading to the drawee on his acceptance of the draft, upon the ground that the transaction upon its face is a sale by the drawer to the drawee upon credit, and that accordingly the bill of lading is a security only for the acceptance, and not for the payment of the draft.⁵⁹ Other cases upon substantially the same facts

72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167. In *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 39 S. W. 338, a usage of local banks to accept in payment certified checks was held reasonable. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 162, 171, 172; *Cent. Dig.* §§ 554-566, 597-628.

⁵⁶ *Welge v. Batty*, 11 Ill. App. 461; *Billingsley v. Pollock*, 69 Miss. 759, 13 South. 828, 30 Am. St. Rep. 585; *Sayles v. Cox*, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940. Contra: *State Bank v. Byrne*, 97 Mich. 178, 56 N. W. 355, 21 L. R. A. 753, 37 Am. St. Rep. 332. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 162, 171, 172; *Cent. Dig.* §§ 554-566, 597-628.

⁵⁷ *British & Amer. Mortg. Co. v. Tibballs*, 63 Iowa, 468, 19 N. W. 319 (cf. *Bank of Montreal v. Ingerson*, 105 Iowa, 349, 75 N. W. 351). See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 162, 171, 172; *Cent. Dig.* §§ 554-566, 597-628.

⁵⁸ *Lowenstein v. Bresler*, 109 Ala. 326, 19 South. 860. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 161, 162, 171, 172; *Cent. Dig.* §§ 554-566, 597-628.

⁵⁹ *National Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 92, 23 L. Ed. 208; *Woolen v. New York & Erie Bank*, Fed. Cas. No. 18,026, 12 Blatchf. 359; *Commercial Bank of Manitoba v. Chicago, St. P. & K. C. Ry. Co.*, 160 Ill. 401, 43 N. E. 756; *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99, 10 South. 407, 32 Am. St. Rep. 332. See

hold that, if the bill of lading makes the goods deliverable to the order of the consignor, the bank is not authorized to surrender the bill without payment of the draft, upon the ground that making the goods so deliverable is almost conclusive evidence of an intention on the part of the consignor to retain the *jus disponendi* and to reserve the property in goods, and that such intention negatives the inference that the sale was on credit and that consequently the bill of lading was to be surrendered upon acceptance of the draft.⁶⁰ While it is true that, where by the bill of lading the goods are deliverable to the order of the seller or his agent, *prima facie* he reserves the property in the goods,⁶¹ yet it is entirely consistent with this reservation that the property shall pass upon acceptance of the draft, rather than upon its payment—in other words, that the seller intends a sale upon credit; and it is submitted that the cases last referred to are erroneous. The rights of the bank, where it discounts or purchases a draft with an attached bill of lading, will be considered later.⁶²

RIGHTS AND LIABILITIES AS TO PROCEEDS OF COLLECTION

52. RELATION OF BANK TO CUSTOMER—When paper intrusted to a bank for collection has been collected, by weight of authority, the bank becomes, in the absence of an agreement to the contrary, a

"Banks and Banking," Dec. Dig. (Key No.) §§ 161, 162; Cent. Dig. §§ 554-566.

⁶⁰ *W. & A. McArthur Co. v. Old Second Nat. Bank*, 122 Mich. 223, 81 N. W. 92 (sight draft, but, being entitled to three days grace, equivalent to a time draft); *Security Bank of Minnesota v. Lutgen*, 29 Minn. 363, 13 N. W. 151; *Second Nat. Bank of Columbia v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618. See *"Banks and Banking," Dec. Dig. (Key No.) §§ 161, 162; Cent. Dig. §§ 554-566.*

⁶¹ *Tiffany, Sales* (2d Ed.) 162.

⁶² *Post*, p. 252.

debtor to its principal for the amount which it has received; but some cases hold that the bank becomes a trustee.

53. INSOLVENCY OF BANK—The authority of the bank to collect is terminated upon its insolvency, and money thereafter received in payment, at least if the insolvency be known to the bank's officers, will be held in trust for the principal, who can recover it in preference to the bank's general creditors, if the fund can be traced into the hands of the bank's receiver.

54. BANK'S LIEN—A bank has a general lien upon paper deposited with it in the usual course of business for collection, and upon the proceeds of such paper, for any balance due to it from the customer upon general account.

Relation of Bank to Customer

When the bank has collected the paper, it becomes, as a rule, a debtor to the customer for the amount collected. In this respect a bank differs from an ordinary collecting agent, whose duty it is to keep the money of his principal separate from his own, and who holds the proceeds of collection in trust. The rule applicable to collections by banks arises from the usage of banks to mingle the proceeds of collection with their own funds.⁶³ "One who collects commercial paper through the agency of banks must be held to impliedly contract that the business may be done according to their well-

⁶³ *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *First Nat. Bank v. Wilmington & W. R. Co.*, 77 Fed. 401, 23 C. C. A. 200; *Freeman's Nat. Bank v. National Tube Works*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; *First Nat. Bank of Richmond v. Davis*, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795; *National Bank of Commerce of Seattle v. Johnson*, 6 N. D. 180, 69 N. W. 49. See "*Banks and Banking*," Dec. Dig. (Key No.) § 165; *Cent. Dig.* §§ 571-885.

known usages, so far as to permit the money collected to be mingled with the funds of the collecting bank.”⁶⁴ From this it follows that, when the paper has been collected, the relation changes from that of agent and principal to that of debtor and creditor.⁶⁵ If, after collection, the bank becomes insolvent, the customer has simply the rights of a general creditor, without preference over the other creditors.⁶⁶ This distinction is lost sight of by some cases, which hold that the collecting bank is a trustee.⁶⁷ In these cases, for the most part, the question

⁶⁴ *Freeman's Nat. Bank v. National Tube Works*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 165; *Cent. Dig.* §§ 571-585.

⁶⁵ *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *First Nat. Bank v. Bank of Monroe (C. C.)* 33 Fed. 408; *Anheuser-Busch B. Co. v. Clayton*, 56 Fed. 759, 6 C. C. A. 108; *First Nat. Bank v. Wilmington & W. R. Co.*, 77 Fed. 401, 23 C. C. A. 200; *Tinkham v. Heyworth*, 31 Ill. 519; *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 44, 54 N. E. 97; *People v. City Bank of Rochester*, 93 N. Y. 582; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515; *First Nat. Bank of Richmond v. Davis*, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795; *North Carolina Corporation Commission v. Merchants' & Farmers' Bank*, 137 N. C. 697, 50 S. E. 308; *Akin v. Jones*, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; *Klepper v. Cox*, 97 Tenn. 534, 37 S. W. 285, 34 L. R. A. 536, 56 Am. St. Rep. 823; *Bowman v. First Nat. Bank*, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870; *Hallem v. Tillinghast*, 19 Wash. 20, 52 Pac. 329; *Peters' Shoe Co. v. Murray*, 31 Tex. Civ. App. 259, 71 S. W. 977. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 165; *Cent. Dig.* §§ 571-585.

⁶⁶ *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *Franklin County Nat. Bank v. Beal (C. C.)* 49 Fed. 606; *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 44, 54 N. E. 97; *State ex rel. Girardey v. Southern Bank*, 33 La. Ann. 957; *Billingsley v. Pollock*, 69 Miss. 759, 13 South. 828, 30 Am. St. Rep. 585; *People v. City Bank of Rochester*, 93 N. Y. 582. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 166, 167; *Cent. Dig.* §§ 574-586.

⁶⁷ *Winstanley v. Second Nat. Bank*, 13 Ind. App. 544, 41 N. E. 956 (but see *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 44, 54 N. E. 97); *Nurse v. Satterlee*, 81 Iowa, 491, 46 N. W. 1102; *Kansas State*

was presented where a collection had been before the insolvency of the bank, and the discussion was mainly directed to the question whether the fund could be traced into the assets of the bank or into the hands of its receiver; a trust relation being taken for granted. Of course, the bank will be held to be a trustee if it appears that such was the understanding.⁶⁸

Instructions to Remit

Where the customer is a depositor of the collecting bank, the proceeds are ordinarily credited to his account and become subject to his check. If the paper is forwarded to the collecting bank with instructions to remit, it seems that the general rule should prevail; for it is the usage of banks not to keep separate and remit the very money collected, but to mingle the money with their own funds as in other cases and to remit by exchange; that is, by a draft, usually its own check, upon another bank in New York or some convenient banking center.⁶⁹ In such cases, therefore, many cases hold that where paper is forwarded for collection and remittance, as well as where it is forwarded for collection and credit, the relation

Bank v. First State Bank, 62 Kan. 788, 64 Pac. 634; *Anheuser-Busch B. Ass'n v. Estate of Farmers' & M. Bank*, 36 Neb. 31, 53 N. W. 1037; *Thompson v. Gloucester City Sav. Inst.* (N. J.) 8 Atl. 97; *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287 (overruled on a point involving identification of fund *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383).

Where the collection is for a stranger, a trust attaches. *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769 (cf. *McCormick Harvesting Mach. Co. v. Yankton Sav. Bank*, 15 S. D. 196, 87 N. W. 974). See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165, 166, 167; *Cent. Dig.* §§ 571-586.

⁶⁸ *Continental Nat. Bank v. Weems*, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

⁶⁹ *Farmers' Bank & Trust Co. of Stanford v. Newland*, 97 Ky. 464, 31 S. W. 38; *Bowman v. First Nat. Bank*, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

after collection is simply that of debtor and creditor.⁷⁰ Other cases hold, however, that in such cases a trust relation arises.⁷¹ It seems that these cases ignore banking usages, which, in the absence of evidence of a different understanding, impliedly become part of the contract, and that something more than mere instruction to remit is required to show a different understanding and to create a trust relation, as, for example, an understanding that the proceeds are to be preserved as the property of the customer and returned to him as such.⁷²

Insolvency of Bank

A bank has no right to receive paper for collection when it is insolvent. Such conduct, if the insolvency be known to its officers, is a fraud. While the paper remains uncollected, the customer can demand it back from a receiver of the bank.⁷³

⁷⁰ First Nat. Bank v. Wilmington & W. R. Co., 77 Fed. 401, 23 C. C. A. 200; G. Ober & Sons Co. v. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118; Union Nat. Bank v. Citizens' Bank, 153 Ind. 44, 54 N. E. 97; First Nat. Bank of Richmond v. Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795; Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921. See, also, Philadelphia Nat. Bank v. Dowd (C. C.) 38 Fed. 172, 2 L. R. A. 480; Merchants' & Farmers' Bank v. Austin (C. C.) 48 Fed. 25. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 165-170; Cent. Dig. §§ 571-596.

⁷¹ Boone County Nat. Bank v. Latimer (C. C.) 67 Fed. 27 (semble); Holder v. Western German Bank, 136 Fed. 90, 68 C. C. A. 554 (semble); Hutchinson v. National Bank, 145 Ala. 196, 41 South. 143; Wallace v. Stone, 107 Mich. 190, 65 N. W. 113; Griffin v. Chase, 36 Neb. 328, 54 N. W. 572. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 165-170; Cent. Dig. §§ 571-596.

⁷² Continental Nat. Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 165-170; Cent. Dig. §§ 571-596.

⁷³ Richardson v. Denegre, 93 Fed. 572, 35 C. C. A. 452. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 166, 167; Cent. Dig. §§ 574-586.

If the bank or the receiver collects the paper, it or he will hold the proceeds as constructive trustee for the customer, who may recover the amount from the receiver, provided the funds can be sufficiently identified and traced into the receiver's hands,⁷⁴ but not otherwise.⁷⁵ If the bank becomes insolvent after receiving the paper, the agency to collect is thereby revoked, and the paper does not pass to the bank's receiver; and if it be collected by the bank, and the proceeds afterwards come into the hands of the receiver, or if it be collected by him, he will hold the proceeds as trustee for the customer.⁷⁶ If the paper has been forwarded by the depositary bank for collection to another bank, which collects it when the depositary bank is insolvent, the customer may re-

⁷⁴ *St. Louis & S. F. Ry. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683; *Illinois Trust & Savings Co. v. First Nat. Bank (C. C.)* 15 Fed. 858; *Beal v. National Exch. Bank of Dallas (C. C.)* 50 Fed. 355; *Id.*, 55 Fed. 894, 5 C. C. A. 304; *Western German Bank v. Norvell*, 134 Fed. 724, 69 C. C. A. 330; *Henderson v. O'Connor*, 106 Cal. 385, 39 Pac. 786; *Showalter v. Cox*, 97 Tenn. 547, 37 S. W. 286; *Bruner v. First Nat. Bank*, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532 (cf. *Sayles v. Cox*, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940). *Post*, p. 354. *See "Banks and Banking," Dec. Dig. (Key No.) §§ 166, 167; Cent. Dig. §§ 574-586.*

⁷⁵ *In re Seven Corners Bank*, 58 Minn. 5, 59 N. W. 633; *Frank v. Bingham*, 58 Hun, 580, 12 N. Y. Supp. 767; *Freiberg v. Stoddard*, 161 Pa. 259, 28 Atl. 1111; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383 (overruling *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287). *See "Banks and Banking," Dec. Dig. (Key No.) §§ 166, 167; Cent. Dig. §§ 574-586.*

⁷⁶ *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *German-American Nat. Bank v. Third Nat. Bank*, Fed. Cas. No. 5,359; *Levi v. National Bank*, Fed. Cas. No. 8,289, 5 Dill. 104; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515; *Bank of Clarke County v. Gilman*, 81 Hun, 486, 30 N. Y. Supp. 1111; *Guignon v. First Nat. Bank*, 22 Mont. 140, 55 Pac. 1051, 1097. *See "Banks and Banking," Dec. Dig. (Key No.) §§ 166, 167; Cent. Dig. §§ 574-586.*

cover the amount from the collecting bank,⁷⁷ subject to its lien, if any.⁷⁸

Bank's Lien

It has already been seen that a bank has a right of set-off, sometimes called a lien, by virtue of which it may apply a general deposit to the payment of a debt of the depositor.⁷⁹ In addition to this, in the absence of anything to show a contrary intention, a bank has a general lien,⁸⁰ strictly speaking, upon all securities deposited with it by a customer in the usual course of business, including paper deposited for collection, and its proceeds, for any balance due the bank on general account.⁸¹ The lien arises from the implied understanding of

⁷⁷ *Armstrong v. National Bank of Boyertown*, 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; *Importers' & Traders' Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Nash v. Second Nat. Bank*, 67 N. J. Law, 265, 51 Atl. 727. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 166, 167; *Cent. Dig.* §§ 574-586.

⁷⁸ *Post*, p. 220.

⁷⁹ *Ante*, p. 222.

⁸⁰ The right of the bank in respect to paper negotiated to and deposited with it is greater than a mere possessory lien, since the bank may sue and recover thereon at least to the amount of the balance due. *Scott v. Franklin*, 15 East, 428; *Percival v. Frempton*, 2 C., M. & R. 180; *Russell v. Haddock*, 8 Ill. 233, 44 Am. Dec. 693. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553.

⁸¹ *Miser v. Currie*, 1 App. Cas. 554; *London Chartered Bank v. White*, 4 App. Cas. 413; *Brandao v. Barnett*, 12 C. & F. 786; *Joyce v. Cockrill*, 179 U. S. 591, 21 Sup. Ct. 227, 45 L. Ed. 332; *Bank of the Metropolis v. New England Bank*, 1 How. 234, 11 L. Ed. 115; *Kelly v. Phelan*, Fed. Cas. No. 7,673; *Cockrill v. Joyce*, 62 Ark. 216, 35 S. W. 221; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366; *Gibbons v. Hecox*, 105 Mich. 509, 63 N. W. 519, 55 Am. St. Rep. 463; *Greene v. Jackson Bank*, 18 R. I. 779, 30 Atl. 963.

Under an Idaho statute, declaring that a banker has a general lien dependent on possession on all property in his hands belonging to a customer for the balance due in the course of the business, the lien does not include stocks of merchandise, etc., which cannot con-

the parties that credit is to be given in the course of dealings between them by the bank to the customer upon the faith of the securities; and, therefore, the lien does not arise where a particular course of dealing or special circumstances are inconsistent with such a lien, as where the deposit is for a specific purpose,⁸² or where securities are accidentally left in the possession of the bank after its refusal to discount or loan upon them,⁸³ or where securities are pledged for the payment of a particular loan or to protect the bank in particular transactions.⁸⁴

veniently pass into the actual possession of the banker. In *re Gesas*, 146 Fed. 734, 77 C. C. A. 291.

Under a similar statute, it was held that a banker, in addition to rights granted by assignment of a life policy, had a lien for the insured's overdraft on a paid-up policy issued to the banker in lieu of the assigned policy. *Crane v. Cameron*, 71 Kan. 880, 81 Pac. 480, 87 Pac. 466. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553.

⁸² *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Fitzgerald v. State Bank*, 64 Minn. 469, 67 N. W. 361; *Loyd v. Lynchburg Nat. Bank*, 86 Va. 690, 11 S. E. 104. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553.

⁸³ *Lucas v. Dorrien*, 7 Taunt. 278; *Bank of Montreal v. White*, 154 U. S. 660, 14 Sup. Ct. 1191, 26 L. Ed. 307; *Hanover Nat. Bank of New York v. Suddath*, 215 U. S. 110, 30 Sup. Ct. 58, 54 L. Ed. 115; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 547-553.

⁸⁴ *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Biebinger v. Continental Bank*, 99 U. S. 143, 25 L. Ed. 271; *Armstrong v. Chemical Nat. Bank*, 41 Fed. 234, 6 L. R. A. 226; *Masonic Sav. Bank v. Bangs' Adm'r*, 84 Ky. 135, 4 Am. St. Rep. 197; *Teutonia Nat. Bank v. Loeb*, 27 La. Ann. 110; *President, etc., of Neponset Bank v. Leland*, 5 Metc. (Mass.) 259; *Brown v. New Bedford Inst. for Sav.*, 137 Mass. 262; *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227; *Duncan v. Brennan*, 83 N. Y. 487; *Wyckoff v. Anthony*, 90 N. Y. 442; *Bacon's Adm'r v. Bacon's Trustees*, 94 Va. 686, 27 S. E. 576.

In such case an additional general lien may be expressly created.

COLLECTION BY CORRESPONDENT BANK

55. RELATION BETWEEN DEPOSITOR AND DEPOSITARY AND COLLECTING BANKS—

Where paper is to be collected at a different place from that in which the depositary bank is situated, and it forwards the paper to a correspondent to make the collection, in the absence of an express agreement between the depositor and the depositary bank in respect to its undertaking, different rules prevail in different jurisdictions as the relations created between the depositor and the banks. By some courts it is held that the depositary bank is responsible to the depositor for the acts of its correspondent in making the collection, and for the proceeds of the paper if it be collected by the correspondent, and that the correspondent is responsible directly to the depositary bank, subject to the exception that if the depositor revokes the agency, or the depositary bank becomes insolvent, the correspondent is responsible for moneys which it has collected directly to the depositor. By other courts it is held that the

Merchants' Nat. Bank of Savannah v. Demere, 92 Ga. 735, 19 S. E. 38.

Notes sent to a bank by its correspondent for discount and credit, which such bank refuses to rediscount, cannot be held by it as collateral to the payment of a loan voluntarily made to cover an overdraft, by virtue of an agreement embodied in a printed form prepared by such bank, and in general use by it, which gives it power to appropriate any securities "deposited with said bank, or which may be in any wise in said bank or under its control, as collateral security for loans or advances already made or hereafter to be made to or for account of" its said correspondent by said bank, "or otherwise." *Hanover Nat. Bank of New York v. Suddath*, 215 U. S. 110, 30 Sup. Ct. 58, 54 L. Ed. 115. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 159, 179; *Cent. Dig.* §§ 547-553, 667-683.

depository bank is responsible to the depositor only for due care in selecting a collecting bank and in forwarding the paper, and for the proceeds of the collection when it has received them by remittance or proper credit from its correspondent, and that the collecting bank is responsible directly to the depositor for its acts in making the collection, and for the proceeds when collected until it has duly accounted therefor to the forwarding bank.

56. SET-OFF OF COLLECTING BANK AGAINST FORWARDING BANK—In the absence of directions to the contrary, a bank to which paper was forwarded by an agent bank for collection may pay the proceeds to the forwarding bank, if it be solvent, by setting off the amount collected against a debt to it from that bank and giving it credit in account, but if the forwarding bank be insolvent, the collecting bank must pay the proceeds to the depositor, unless it has a lien thereon.

57. LIEN OF COLLECTING BANK—When paper is forwarded by one bank to another for collection, unless the collecting bank has notice, by the form of the indorsement or otherwise, that the forwarding bank is not the owner of the paper, the collecting bank has a lien thereon, and on the proceeds, not only for any advances made upon the paper, but, in most jurisdictions, for any general balance against the forwarding bank which has been allowed to remain to be met by the proceeds of paper to be transmitted for collection in the usual course of business.

Collection by Correspondent Bank—In General

Where a bank receives from a correspondent for collection paper payable at a distant place, the parties necessarily contemplate that the bank shall send the paper to the place where

it is payable, and shall employ some bank or other agent there to collect and remit the proceeds of the collection. So far as the debtor or drawee is concerned, such agent is the agent of the customer, and payment to the agent is binding upon him. The courts are divided, however, upon the question whether privity of contract is created between the principal—that is, the customer—and the collecting bank, or subagent, so that the collecting bank is directly responsible to the customer, and the depositary bank, or agent, is responsible only for due care in selecting the subagent, or whether the subagent is agent of and directly responsible to the depositary bank, and it is responsible to the customer for the neglects and defaults of the collecting bank.

No difficulty arises if the parties have expressed their intention in this regard, as where it is agreed that the depositary bank, in receiving the paper for collection, assumes no responsibility beyond care in selecting agents at other points, and in forwarding to them.⁸⁵ Frequently a notice to this effect is contained in the customer's passbook in which the deposit for collection is entered.⁸⁶ In the absence of any express or implied agreement, the answer to the question is made to depend upon the understanding to be implied from the deposit of the paper for collection, and in their interpretation of this transaction the courts have taken opposite views, and are about equally divided.⁸⁷ By some courts, including the Supreme Court

⁸⁵ *McBride v. Illinois State Bank*, 138 App. Div. 339, 121 N. Y. Supp. 1041; *San Francisco Nat. Bank v. American Nat. Bank of Los Angeles*, 5 Cal. App. 408, 90 Pac. 558 (local usage). See, also, *Holder v. Western German Bank (C. C.)* 132 Fed. 187. Cf. *First Nat. Bank of Omaha v. First Nat. Bank*, 55 Neb. 303, 75 N. W. 843. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156, 171, 172; *Cent. Dig.* §§ 539-546, 597-628.

⁸⁶ *In re State Bank*, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156, 171, 172; *Cent. Dig.* §§ 539-546, 597-628.

⁸⁷ Where a bank in Illinois sent for collection to a North Carolina bank a draft drawn on a bank of that state, the liability of the

of the United States, it is held that the depositary bank undertakes to collect the paper, and thus assumes the liability of an independent contractor, with responsibility for the acts and defaults of its subagents.⁸⁸ By other courts it is held that the depositary bank merely undertakes to use due care in selecting a subagent and in transmitting the paper, and that if it exercises such care it is not responsible for the subagent's acts and defaults.⁸⁹

collecting bank was governed by the law of North Carolina, and, the question there being an open one, the liability was to be determined by the general principles of commercial law, the New York cases being approved. *Kent v. Dawson Bank*, Fed. Cas. No. 7,714, 13 Blatchf. 237.

Where a bank in New York sent for collection to a Tennessee bank a check drawn on a Texas bank, it was held that the liability of the collecting bank was determined by the common law as expounded by the New York courts. *St. Nicholas Bank of New York v. State Nat. Bank*, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156, 171, 172; *Cent. Dig.* §§ 539-546, 597-628.

⁸⁸ *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722; *Mackersy v. Remsay*, 9 Cl. & F. 818; *Van Wart v. Wooley*, 3 B. & C. 439; *Brown v. People's Bank for Savings of St. Augustine*, 59 Fla. 163, 52 South. 719 (prior to Acts 1909, c. 5951); *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; *Martin v. Hibernia Bank & Trust Co.*, 127 La. 301, 53 South. 572; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Streissguth v. National German-American Bank*, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 213; *Power v. First Nat. Bank*, 6 Mont. 251, 12 Pac. 597; *Titus v. Mechanics' Nat. Bank of Trenton*, 35 N. J. Law, 588; *Allen v. Merchants' Bank of City of New York*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; *Ayrault v. Pacific Bank*, 47 N. Y. 575, 7 Am. Rep. 489; *National Revere Bank of Boston v. National Bank of Republic of New York*, 172 N. Y. 102, 64 N. E. 799; *Commercial Bank v. Red River Val. Nat. Bank*, 8 N. D. 382, 79 N. W. 859; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465; *State Nat. Bank of Ft. Worth v. Thomas Mfg. Co.*, 17 Tex. Civ. App. 214, 42 S. W. 1016. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156, 171, 172; *Cent. Dig.* §§ 539-546, 597-628.

⁸⁹ *East Haddam Bank v. Scovil*, 12 Conn. 303; *Waterloo Milling*

It is generally conceded that the decisive consideration is: What was the understanding of the parties as to the duty the depository bank undertakes to perform? The nature of this understanding is really a question of fact. In declaring, on the one hand, that the undertaking is to collect, or, on the other hand, that the undertaking is merely to transmit to a suitable agent for collection, the court lays down a more or less arbitrary rule, based upon the assumed intention of the parties, to which it resorts because the parties either have no intention on the point or have failed to express it. If, as intimated by the Supreme Court of the United States,⁹⁰ the question is to be determined "according to the principles which will best pro-

Co. v. Kuenster, 158 Ill. 259, 41 N. E. 906, 29 L. R. A. 794, 49 Am. St. Rep. 156; Wilson v. Carlinville Nat. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632; Irwin v. Reeves Pulley Co., 20 Ind. App. 101, 48 N. E. 601, 50 N. E. 317; Guelick v. National State Bank, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110; Second Nat. Bank v. Merchants' Nat. Bank, 111 Ky. 930, 65 S. W. 4, 55 L. R. A. 273, 98 Am. St. Rep. 439; Citizens' Bank of Baltimore v. Howell, 8 Md. 530, 63 Am. Dec. 714; President, etc., of Dorchester & Milton Bank v. President, etc., of New England Bank, 1 Cush. (Mass.) 177; Lord v. Hingham Nat. Bank, 186 Mass. 161, 71 N. E. 312; Third Nat. Bank of Louisville v. Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78; Daly v. Butchers' & Drovers' Bank, 56 Mo. 94, 17 Am. Rep. 663; First Nat. Bank of Pawnee City v. Sprague, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644 (cf. First Nat. Bank of Omaha v. First Nat. Bank, 55 Neb. 303, 75 N. W. 843); Mechanics' Bank v. Earp, 4 Rawle (Pa.) 384; Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; Fanset v. Garden City State Bank, 24 S. D. 248, 123 N. W. 686; Second Nat. Bank of Columbia v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Givan v. Bank of Alexandria (Tenn.) 52 S. W. 923, 47 L. R. A. 270; Winchester Milling Co. v. Bank of Winchester, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441; Stacy v. Dane County Bank, 12 Wis. 629. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156, 171, 172; *Cent. Dig.* §§ 539-546, 597-628.

⁹⁰ Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156, 171, 172; *Cent. Dig.* §§ 539-546, 597-628.

mote the welfare of the commercial community," perhaps the rule adopted in that court, which does not compel the customer to resort for a remedy to a distant and unknown bank, is to be preferred, although in favor of the other rule it is to be said that its result is to dispose of any controversy in a single action.

Liability of Depositary and Collecting Banks

In jurisdictions where the rule prevails that the depositary bank is responsible for the acts and defaults of the correspondent or collecting bank, it follows that if that bank fails in any of its duties as a collecting agent, as by failing to make due presentment or to give due notice of dishonor,⁹¹ the customer's right of action is solely against the depositary bank. And if the money has once been received by the collecting bank, it is the same as if it had been received by the depositary bank, its principal, and the latter is responsible to its customer for the amount collected, although the collecting bank fails to remit or to account to it.⁹² It follows that for any such default the depositary bank may maintain an action against the collecting bank.⁹³ It does not follow, however, that the col-

⁹¹ Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Commercial Bank of Pennsylvania v. Union Bank of New York, 11 N. Y. 203; National Revere Bank of Boston v. National Bank of Republic of New York, 172 N. Y. 102, 64 N. E. 799. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 164-172; *Cent. Dig.* §§ 571-628.

⁹² Hyde v. First Nat. Bank, Fed. Cas. No. 6,970, 7 Biss. 156; Kent v. Dawson Bank, Fed. Cas. No. 7,714, 13 Blatchf. 237; Brown v. People's Bank for Savings of St. Augustine, 59 Fla. 163, 52 South. 719; First Nat. Bank of Girard v. Craig, 3 Kan. App. 166, 42 Pac. 830; Simpson v. Walby, 63 Mich. 439, 30 N. W. 199; Power v. First Nat. Bank, 6 Mont. 251, 12 Pac. 597; St. Nicholas Bank of New York v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241 (cf. Indig v. Bank, 80 N. Y. 100). See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

⁹³ Merchants' & Manufacturers' Bank v. Stafford Nat. Bank, Fed. Cas. No. 9,438; Commercial Bank of Pennsylvania v. Union Bank

lecting bank can retain the proceeds as against the depositor or owner. He may revoke the agency at any time, and seek the paper or its proceeds in the hands of the correspondent bank, unless that bank has made advances thereon to the forwarding bank on the faith of the paper, or is able to assert a lien for a general balance thereon against the forwarding bank. "This is an equitable right, not necessarily resting in privity of contract with the party from whom such relief is sought."⁹⁴ And if the collecting bank has in its hands the proceeds of collection, when the depositary bank by reason of its insolvency may not lawfully receive the same,⁹⁵ the customer's right of recovery is directly against the collecting bank.⁹⁶

On the other hand, in jurisdictions where the rule prevails that the depositary bank undertakes merely to use due care in the selection of a collecting bank, it follows that if such care be used, and the collecting bank fails in its duty as a collecting agent, as by failing to make due presentment or to give

of New York, 11 N. Y. 203; *Commercial Bank v. Red River Val. Nat. Bank*, 8 N. D. 382, 79 N. W. 859. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

⁹⁴ *Naser v. First Nat. Bank of the City of New York*, 116 N. Y. 492, 22 N. E. 1077. And see *Bank of Clarke County v. Gilman*, 81 Hun, 486, 30 N. Y. Supp. 1111, 1113. As to the bank's lien, post, p. 222. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

⁹⁵ Ante, p. 208.

⁹⁶ *Old Nat. Bank v. German-American Nat. Bank*, 155 U. S. 556, 15 Sup. Ct. 221, 39 L. Ed. 259; *First Nat. Bank v. Bank of Monroe* (C. C.) 33 Fed. 408; *Fifth Nat. Bank v. Armstrong* (C. C.) 40 Fed. 46; *Importers' & Traders' Nat. Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Bank of Clarke County v. Gilman*, 81 Hun, 486, 30 N. Y. Supp. 1111; *Reeves v. State Bank*, 8 Ohio St. 465. Cf. *Corn Exch. Bank v. Farmers' Nat. Bank of Lancaster, Pa.*, 118 N. Y. 443, 23 N. E. 923, 7 L. R. A. 559. See, also, *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; *Boykin v. Bank of Fayetteville*, 118 N. C. 566, 24 S. E. 357. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 57-596.

due notice of dishonor,⁹⁷ or by failing to remit or account for the proceeds of the collection,⁹⁸ the customer's right of action is solely against the collecting bank. The depositary bank is, of course, responsible if it selects an improper agent, as the drawee bank,⁹⁹ or if it fails to exercise reasonable diligence in forwarding the paper to the collecting bank.¹⁰⁰ And it is the duty, if it fails to hear from its correspondent in due course, to make inquiry and to take steps to protect its customer's interest, and to notify him of the fact, without unreasonable delay.¹⁰¹ Where, as often happens, the collecting bank, not having a correspondent at the place of collection, must forward the paper to a correspondent, which in turn forwards the paper upon its way, either to a correspondent for further forwarding or directly to a bank at the place of collection,

⁹⁷ *Guelick v. National State Bank*, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597, 628.

⁹⁸ *San Francisco Nat. Bank v. American Nat. Bank of Los Angeles*, 5 Cal. App. 408, 90 Pac. 558; *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101, 48 N. E. 601, 50 N. E. 317; *President, etc., of Dorchester & Milton Bank v. President, etc., of New England Bank*, 1 Cush. (Mass.) 177; *First Nat. Bank of Pawnee City v. Sprague*, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; *Fanset v. Garden City State Bank*, 24 S. D. 248, 123 N. W. 686. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

⁹⁹ *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. 249, 18 L. R. A. (N. S.) 441; ante, p. 195. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-172; *Cent. Dig.* §§ 571-628.

¹⁰⁰ *Bedell v. Harbine Bank of Fairbury*, 62 Neb. 339, 86 N. W. 1060. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

¹⁰¹ *Second Nat. Bank v. Merchants' Nat. Bank*, 111 Ky. 930, 65 S. W. 4, 55 L. R. A. 273, 98 Am. St. Rep. 439. See, also, *First Nat. Bank of Trinidad v. First Nat. Bank of Denver*, Fed. Cas. No. 4,810, 4 Dill. 490; *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 171, 172; *Cent. Dig.* §§ 597-628.

each successive bank is agent of the owner, and the several banks in the chain of transmission are responsible only for the selection of proper agents and for their own diligence and the propriety of their action in respect to the collection.¹⁰² In accordance with the custom of bankers, the collecting bank is authorized to remit the proceeds to the depositary bank, which then, and not before, will owe the amount to its customer; but its liability is limited to the amount which it receives by actual payment¹⁰³ or by proper credit from the collecting bank.¹⁰⁴

Right of Set-Off or Lien of Collecting Bank Against Forwarding Bank

According to banking usages, when the depositary or other forwarding bank is indebted to its correspondent, to which it has forwarded paper for collection, it is customary for the collecting bank, instead of remitting the proceeds of the collection to the forwarding bank, to credit that bank with the amount of the collection, and when credit has been duly given the collecting bank is discharged of its liability. In other words, "in the absence of directions to the contrary, the collecting bank may pay it [the amount collected] to the bank to which it should regularly be remitted, by setting it off against a debt due from that bank, and giving credit for it in the account," and a payment so made by a set-off and adjustment of accounts in the usual way is good against the owner of the paper.¹⁰⁵ In

¹⁰² Winchester Milling Co. v. Bank of Winchester, 120 Tenn. 225, 111 S. W. 250, 18 L. R. A. (N. S.) 441. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 165-172; Cent. Dig. §§ 571-628.

¹⁰³ Waterloo Milling Co. v. Kuenster, 158 Ill. 259, 41 N. E. 906, 29 L. R. A. 794, 49 Am. St. Rep. 156. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 165-170; Cent. Dig. §§ 571-596.

¹⁰⁴ Post, p. 220.

¹⁰⁵ Freeman's Nat. Bank v. National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461. See, also, Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 165-170; Cent. Dig. §§ 571-596.

case of the insolvency of the forwarding bank, however, since it could no longer lawfully receive payment, the collecting bank can no longer discharge itself of liability in this way, and must account for the proceeds of the collection to the customer,¹⁰⁶ unless the circumstances are such that it can, as against him, assert a lien on the proceeds.¹⁰⁷

When the indorsement by the customer to the depository bank is "for collection," the indorsement is constructive notice to every bank to which the paper may be forwarded that the forwarding bank is not the owner of the paper, and that it is forwarded simply for collection on account of the customer. The collecting bank can therefore acquire no lien or better title to the paper or to its proceeds than belonged to the depository bank.¹⁰⁸ And its position is the same if it has notice otherwise derived than by the form of the indorsement that the depository bank received the paper simply for collection.¹⁰⁹ It is true, as has been explained, that ordinarily, if the forwarding bank is in its debt, the collecting bank may make payment by credit and set-off to the forwarding bank. But if in the meantime the forwarding bank has become insolvent, the

¹⁰⁶ *Old Nat. Bank v. German-American Nat. Bank*, 155 U. S. 556, 15 Sup. Ct. 221, 39 L. Ed. 259. See cases cited post, note 108. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 166, 167; *Cent. Dig.* §§ 574-582.

¹⁰⁷ Post, p. 222.

¹⁰⁸ *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *Old Nat. Bank v. German-American Nat. Bank*, 155 U. S. 556, 15 Sup. Ct. 221, 39 L. Ed. 259; *First Nat. Bank v. Bank of Monroe (C. C.)* 33 Fed. 408; *Peck v. First Nat. Bank (C. C.)* 43 Fed. 357; *Cecil Bank v. President, etc., of Farmers' Bank of Maryland*, 22 Md. 148; *Bank of Clarke County v. Gilman*, 81 Hun, 486, 30 N. Y. Supp. 1111, affirmed 152 N. Y. 634, 46 N. E. 1145; *Bank of Sherman v. Weiss*, 67 Tex. 331, 3 S. W. 299. And see cases cited supra, note 85. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 159, 165-170; *Cent. Dig.* §§ 547-553, 571-596.

¹⁰⁹ *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; ante, p. 29. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 159, 165-170; *Cent. Dig.* §§ 547-553, 571-596.

collecting bank can no longer dispose of the proceeds of the collection in this manner to the prejudice of the rights of the customer of which it had notice, at least if the insolvency is disclosed.¹¹⁰

If, however, the indorsement to the depository bank is unrestricted, and the collecting bank is without notice, whether derived from the indorsement or otherwise, that the depository bank is not the owner of the paper, the collecting bank will have a lien upon the paper, or the proceeds of collection, not merely for any advance which it may have made upon the paper, but for any general balance against the forwarding bank, if the balance has been allowed to arise and to remain on the faith of receiving payments from such collections pursuant to the usual course of dealing between the two banks.¹¹¹ And

¹¹⁰ *Old Nat. Bank v. German-American Nat. Bank*, 155 U. S. 556, 15 Sup. Ct. 221, 39 L. Ed. 259. And see cases cited *supra*, notes 96, 108. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 166, 167; *Cent. Dig.* §§ 574-582, 586.

¹¹¹ *Bank of Metropolis v. New England Bank*, 1 How. 234, 11 L. Ed. 115; *Id.*, 6 How. 212, 12 L. Ed. 409; *Sweeney v. Easter*, 1 Wall. (U. S.) 166, 17 L. Ed. 681; *Vickery v. State Savings Ass'n (C. C.)* 21 Fed. 773; *Wyman v. Colorado Nat. Bank*, 5 Colo. 30, 40 Am. Rep. 133; *American Exch. Nat. Bank of Chicago v. Theummler*, 195 Ill. 90, 62 N. E. 932, 58 L. R. A. 51, 88 Am. St. Rep. 177; *Garrison v. Union Trust Co.*, 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407; *Continental Nat. Bank v. First Nat. Bank*, 84 Miss. 103, 36 South. 189; *Milliken v. Shopleigh*, 36 Mo. 596, 88 Am. Dec. 171; *Winfield Nat. Bank v. McWilliams*, 9 Okl. 493, 60 Pac. 229; *Carroll v. Exchange Bank*, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

In *American Exch. Nat. Bank of Chicago v. Theummler*, *supra*, it seems that the court erred in holding that the proceeds must be applied to payment of the indebtedness before notice of the insolvency of the forwarding bank, and also before notice that that bank received the draft as agent for collection only, relying on *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363, which was distinguishable by reason of the restrictive indorsement to the depository bank. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

the rule has been applied where the indorsement by the forwarding bank to the collecting bank was "for collection"; the question being, not whether title is apparently transferred to the collecting bank, but whether it has a right to treat the transmitting bank as the owner.¹¹² In New York, and one or two other states,¹¹³ the rule that the collecting bank has a right to set off the proceeds against such a general balance has not been approved. This has resulted from the doctrine, prevailing in New York, that the holder of negotiable paper as collateral security for an antecedent indebtedness is not a purchaser for value; but the courts seem also to have regarded an indorsement "for collection" by the forwarding bank as notice that that bank was not owner of the paper.¹¹⁴ The Negotiable Instruments Law provides¹¹⁵ that "an antecedent or pre-existing debt constitutes value," and it has been generally held thereunder that an antecedent debt constitutes value, even though the instrument is transferred merely as collateral security for the debt.¹¹⁶ It seems that the effect of the Negotiable Instruments

¹¹² *Vickery v. State Savings Bank* (C. C.) 21 Fed. 773. See, also, *Carroll v. Exchange Bank*, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101. But see *Josiah Morris & Co. v. Alabama Carbon Co.*, 139 Ala. 620, 36 South. 764. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

¹¹³ See *First Nat. Bank of Clarion v. Gregg*, 79 Pa. 384; *Hackett v. Reynolds*, 114 Pa. 328, 6 Atl. 689. Cf. *Nash v. Second Nat. Bank*, 67 N. J. Law, 265, 51 Atl. 727. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

¹¹⁴ *McBride v. Farmers' Bank*, 26 N. Y. 450; *Stark v. United States Nat. Bank*, 41 Hun (N. Y.) 506; *Dickerson v. Wason*, 47 N. Y. 439, 7 Am. Rep. 455; *Bank of America v. Waydell*, 103 App. Div. 25, 92 N. Y. Supp. 666; *Id.*, 104 App. Div. 620, 94 N. Y. Supp. 135, affirmed 187 N. Y. 115, 79 N. E. 857. Cf. *Hutchinson v. President and Directors of Manhattan Co.*, 150 N. Y. 250, 44 N. E. 775. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

¹¹⁵ Negotiable Instruments Law, § 25.

¹¹⁶ *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885. See cases collected in Brannan, *Neg. Inst. Law*, 207. The holding of the lower courts of New York has generally been

Law is to bring the law of New York into harmony with that generally prevailing elsewhere.¹¹⁷

to the contrary. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 165-170; *Cent. Dig.* §§ 571-596.

¹¹⁷ So held in *King v. Bowling Green Trust Co.*, 145 App. Div. 398, 129 N. Y. Supp. 977. But see *Bank of America v. Waydell*, 103 App. Div. 25, 92 N. Y. Supp. 666; *Id.*, 104 App. Div. 620, 94 N. Y. Supp. 135, affirmed 187 N. Y. 115, 79 N. E. 857. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 156, 159; *Cent. Dig.* §§ 539-553.

CHAPTER VII

LOANS AND DISCOUNTS

- 58. Power of Loaning and Discounting.
- 59. Restrictions upon Power to Loan.
- 60. Meaning of Discount.
- 61. Rate of Interest—Usury—In General.
- 62. National Banks.
- 63. Collateral Security—In General.
- 64. Bank's Own Stock.
- 65. Real Estate Mortgage.

POWER OF LOANING AND DISCOUNTING

- 58. The making of loans and discounts is a primary function of banking, and the power to make loans and discounts is usually expressly conferred upon incorporated banks.

RESTRICTIONS UPON POWER TO LOAN

- 59. Restrictions upon the power to loan are often imposed by limitation of the amount that may be lent, or of the character of the securities upon which money may be lent, or in other respects; but, unless the unauthorized transaction be declared void, it is generally held that the evidence of debt or the security, although unauthorized, may be enforced, and that the only remedy is a direct proceeding by the government against the bank for violation of its charter.

MEANING OF DISCOUNT

60. Discount, or strictly bank discount, is a deduction of interest made when a bank loans money to a borrower upon his negotiable paper or other evidence of debt executed by him to the bank and payable at a future day, or when the bank advances money to the holder of negotiable paper or other evidences of debt so payable which he transfers to the bank; the interest being computed at an agreed rate upon the amount promised in the paper for the time it has to run, and deducted in advance. Discount may, therefore, be by way of loan or of purchase. By weight of authority, the power to discount includes the power to discount by way of purchase; but, even where the contrary doctrine prevails, it is held that upon a discount by way of purchase the evidence of debt may be enforced, although the discount was unauthorized.

In General

As has been explained, the making of advances by way of loan and discount is one of the primary and essential functions of banking.¹ Most of the questions which arise under this chapter are not questions of general commercial law, but relate to the powers of, and restrictions imposed upon, incorporated banks in the making of loans and discounts, and to the interest or rate of discount which may be charged. These questions, as a rule, do not concern private bankers, although the laws concerning usury sometimes have particular application to them, as well as to incorporated banks.²

¹ Ante, p. 1.

² See *In re Samuel Wilde's Sons* (D. C.) 133 Fed. 562; *Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 21. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 176, 177; *Cent. Dig.* §§ 653-655.

Power to Loan—Restrictions

Usually the power of lending money is among the express powers conferred upon incorporated banks.³ The power is often restricted by limitation of the amount that may be loaned to officers⁴ or others,⁵ by forbidding loans to officers,⁶ or by designating the character of the securities on which money may be lent.⁷ Such restrictions are imposed primarily for the benefit of the stockholders, depositors, and other persons interested in the bank, and although the particular transaction may be unauthorized, or even forbidden, it is generally held that, unless it is declared to be void,⁸ the debt or security may be enforced; the remedy, if any, being a direct proceeding by the state against the bank for the violation of its charter.⁹ Illustrations of this are frequent under the National

³ See *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430; *Bank of New Hanover v. Williams*, 79 N. C. 129. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 176; *Cent. Dig.* § 653.

⁴ *Richmond Bank v. Robinson*, 42 Me. 589; *Pemigewassett Bank v. Rogers*, 18 N. H. 255. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 178; *Cent. Dig.* § 660.

⁵ *Murry Nelson & Co. v. Leiter*, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 176; *Cent. Dig.* § 653.

⁶ *Fisher v. Murdock*, 13 Hun (N. Y.) 485. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 178; *Cent. Dig.* § 660.

⁷ *Post*, p. 246.

⁸ *President, etc., of Western Bank v. Mills*, 7 Cush. (Mass.) 539; *Mills v. Rice*, 6 Gray (Mass.) 458. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 178; *Cent. Dig.* §§ 656-666.

⁹ *Bates v. State Bank*, 2 Ala. 451; *Savings Bank of San Diego County v. Burns*, 104 Cal. 473, 38 Pac. 102; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; *Bond v. Central Bank of Georgia*, 2 Ga. 92; *Murry Nelson & Co. v. Leiter*, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142; *Richmond Bank v. Robinson*, 42 Me. 589; *Fargason v. Oxford Mercantile Co.*, 78 Miss. 65, 27 South. 877; *St. Joseph Fire & Marine Ins. Co. v. Hauck*, 71 Mo. 465 (cf. *McClintock v. Central Bank of Kansas City*, 120 Mo. 127, 24 S. W. 1052); *People's Trust Co. v. Pabst*, 113 App. Div. 375, 98 N. Y. Supp. 1045; *Bank of Middlebury v. Bingham*, 33

Bank Act.¹⁰ Thus a violation of the provision that the total liabilities to a national bank of any person for money borrowed shall at no time exceed one-tenth of the amount of its capital stock actually paid in will not enable a borrower to avoid payment of a loan.¹¹ In construing this section the court said: "We do not think it required by public policy, or that Congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank."¹²

Meaning of Discount—Loan or Purchase

"A discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank."¹³ Discount is thus "the difference between the price and the amount of the debt, the evidence of which is transferred, and that difference represents interest charged, being at some rate, according

Vt. 621. See, also, *Rome Sav. Bank v. Krug*, 102 N. Y. 331, 6 N. E. 682; *Dunn v. O'Connor*, 25 App. Div. 73, 49 N. Y. Supp. 270. Contra: *Workingmen's Banking Co. v. Rautenberg*, 103 Ill. 460, 42 Am. Rep. 26. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 176, 178; *Cent. Dig.* §§ 653-666.

¹⁰ Post, p. 295.

¹¹ *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. Ed. 648; *The Seattle*, 170 Fed. 284, 95 C. C. A. 480; *Richeson v. National Bank of Mena (Ark.)* 132 S. W. 913; *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 269; *Cent. Dig.* §§ 1014-1022.

¹² *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. Ed. 648. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 269; *Cent. Dig.* §§ 1014-1022.

¹³ *Fleckner v. Bank of United States*, 8 Wheat. 350, 5 L. Ed. 631, per Story, J. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 177; *Cent. Dig.* §§ 654, 655.

to which the price paid, if invested until the maturity of the debt, will just produce its amount.”¹⁴ Strictly speaking, therefore, discount consists in finding that sum which, if put at interest until the maturity of the debt at the particular rate, will then amount to the face of the debt, or, in other words, in finding the present worth of the debt under the conditions stated. It is to be observed, however, that bank discount, as it is practiced, gives a somewhat different result from discount in the strict sense of the term, for it is customary to calculate the interest upon the debt until its maturity and to deduct this interest; the proceeds received by the customer being therefore a little less than the present worth of the debt, the bank thus securing a slight profit in addition to that afforded by true discount.¹⁵ The transaction, whereby the bank pays or advances to the holder of paper the amount of the debt thereby evidenced less the amount of the interest deducted in consideration of the transfer of the paper to the bank by the holder, is itself termed a “discount,” and the paper is classified among the assets of the bank under the head of “loans and discounts.”

In the transaction just described the paper is transferred by the holder to the bank, which acquires his right to receive payment of the debt thereby secured from the maker, drawer, or acceptor as the case may be. The transaction is thus a sale, and not a loan; for, even if the transferrer indorses the paper, his liability to pay is only secondary.¹⁶ On the other hand, the bank may discount the customer's own paper, executed by him to the bank, by deducting the interest in advance. In this case the transaction is a loan by way of discount; the borrower's indebtedness to the bank being evidenced

¹⁴ *National Bank of Gloversville v. Johnson*, 104 U. S. 271, 26 L. Ed. 742. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 177; *Cent. Dig.* §§ 654, 655.

¹⁵ See Dunbar, *Theory & History of Banking*, p. 10.

¹⁶ *Post*, p. 233.

by the paper on which he is generally primarily liable.¹⁷ In both cases, therefore, the bank discounts the paper, although in the one case it is by way of purchase, and in the other by way of loan; or, otherwise stated, in the one case it is a purchase by way of discount, and in the other a loan by way of discount.¹⁸ It is sometimes loosely said that the terms "loans" and "discounts" are synonymous;¹⁹ but such a statement does not bear analysis, for there may be a loan without discount.²⁰

Power to Discount

It follows from what has been said that, if by the law of its incorporation a bank is granted the power of discounting commercial paper and other evidences of indebtedness, it has the power to discount commercial paper, either by way of purchase or by way of loan, subject only to the provisions of law in respect to usury. The question has frequently arisen with reference to national banks, which are empowered to exercise "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, * * * by buying and selling exchange,

¹⁷ *Eastin v. Third Nat. Bank of Cincinnati*, 102 Ky. 64, 42 S. W. 1115. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 178; *Cent. Dig.* §§ 656-666.

¹⁸ See *Danforth v. National State Bank of Elizabeth*, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622; *Morris v. Third Nat. Bank of Springfield*, 142 Fed. 25, 73 C. C. A. 211; *Pape v. Capitol Bank of Topeka*, 20 Kan. 444, 27 Am. Rep. 183; *Atlantic State Bank of City of Brooklyn v. Savery*, 82 N. Y. 291; *Niagara County Bank v. Baker*, 15 Ohio St. 68. "See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 178; *Cent. Dig.* §§ 656-666.

¹⁹ See *National Bank of Gloversville v. Johnson*, 104 U. S. 271, 26 L. Ed. 742. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 176-178; *Cent. Dig.* §§ 653-666.

²⁰ See *Planters' & Merchants' Bank v. Goetter*, 108 Ala. 408, 19 South. 54. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 176-178; *Cent. Dig.* §§ 653-666.

coin and bullion; by loaning money on personal security,"²¹ etc. Under this section some cases have held that a national bank is not authorized to purchase negotiable paper or to acquire any title to such paper by purchase.²² And the same holding has been made by some courts with respect to state banks under similar statutory provisions.²³ These cases appear to rest upon the mistaken view that a discount can arise only by way of loan, from which it is argued that if the banks had the power to purchase negotiable paper they could evade the restrictions upon the rate of interest allowed to be taken upon loans, being at liberty to decline making loans to their customers upon their own paper, and afterwards to buy up the very paper, which had been offered for discount and refused, at such price as the banks might choose to give. By weight of authority, however, under the power to discount a national bank may acquire commercial paper by purchase as well as by loan.²⁴ And the same holding has been made by many courts under similar provisions applicable to state

²¹ Rev. St. § 5136 (U. S. Comp. St. 1901, p. 3455).

²² *First Nat. Bank of Rochester v. Pierson*, 24 Minn. 144, 31 Am. Rep. 341 (holding that the purchase of a note, where no loan is intended, is not within the power of a national bank, and that it did not acquire title and could not recover thereon); *Lazear v. National Union Bank of Maryland*, 52 Md. 78, 36 Am. Rep. 355 (holding, by a divided court, that a national bank has no power to purchase negotiable paper except from surplus). See *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5 (overruling *First Nat. Bank of Rochester v. Pierson*, supra, so far as it holds that a plea of ultra vires can be interposed to the bank's recovery). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 269; *Cent. Dig.* §§ 1014-1022.

²³ *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683. Cf. *Becker's Investment Agency v. Rea*, 63 Minn. 459, 65 N. W. 928. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 177; *Cent. Dig.* §§ 654, 655.

²⁴ *Danforth v. National State Bank of Elizabeth*, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622; *Morris v. Third Nat. Bank of Springfield*, 142 Fed. 25, 73 C. C. A. 211; *First Nat. Bank of Greenville v. Sherburne*, 14 Ill. App. 566; *Nicholson v. National Bank of New*

banks.²⁵ It does not follow from this that the bank can thus evade the limitations as to the rate of interest. There is "nothing in the act of Congress, nor in reason, why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper made directly to the bank. It is true that, as between natural persons, the purchase of such paper, when made in good faith, and not as a disguise for a loan, is not subject

Castle, 92 Ky. 251, 17 S. W. 627, 16 L. R. A. 223; Newport Nat. Bank v. Board of Education of Newport, 114 Ky. 87, 70 S. W. 186 (has power to purchase bonds issued by the board of education of a city); First Nat. Bank of Rochester v. Harris, 108 Mass. 514 (may purchase checks); Smith v. Exchange Bank of Pittsburg, 26 Ohio St. 141. See, also, National Pemberton Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235; Prescott Nat. Bank of Lowell v. Butler, 157 Mass. 548, 32 N. E. 909; Schofield v. State Nat. Bank, 97 Fed. 282, 38 C. C. A. 179.

Cf. Rev. St. § 5200 (U. S. Comp. St. 1901, p. 3494), as amended by Act June 22, 1906, c. 3516, 34 Stat. 451 (U. S. Comp. St. Supp. 1909, p. 1331), limiting the liabilities of persons to national banks for money borrowed, and providing that "the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed."

"The purchase of negotiable paper by a bank is as clearly within its legitimate powers, as is the collection of such paper by the bank." Taft v. Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387.

It is within the power of a national bank to buy a draft drawn in its favor by a seller upon a buyer, accompanied by the bill of lading. Union Nat. Bank v. Rowan, 23 S. C. 339, 55 Am. Rep. 26. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 269, 271; Cent. Dig. §§ 725-737, 978, 1014-1022.

²⁵ Pape v. Capitol Bank of Topeka, 20 Kan. 444, 27 Am. Rep. 183; Atlantic State Bank of City of Brooklyn v. Savery, 82 N. Y. 291; Neilsville Bank v. Tuthill, 4 Dak. 295, 30 N. W. 154. See, also, Salmon Falls Bank v. Leyser, 116 Mo. 51, 22 S. W. 504 (holding that a bank engaged in the general banking business has, in the absence of restriction, power to buy notes outright). See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 177, 178, 194; Cent. Dig. §§ 654-666, 725.

to the usury laws; but it is otherwise as to a bank.”²⁶ Under the National Bank Act the limitation upon the rate of interest expressly includes discounts as well as loans.²⁷

A few cases have drawn a distinction between purchases where the holder of the paper indorses it generally (thereby becoming liable on the paper), and purchases where the holder indorses without recourse, or transfers paper payable to bearer by mere delivery, or transfers paper payable to order by mere assignment; the courts declaring the transaction in the one case to be a loan, on the ground that the transferrer is by his indorsement liable for payment, and in the other case to be a mere purchase on the ground that he is not so liable.²⁸ Upon principle, however, as well as by weight of authority, the indorsement of paper, though by way of discount, is not a loan, but a sale; and a purchase by a national bank by way of discount, whether or not the paper be generally indorsed, is authorized because it falls within its power of discounting.²⁹

²⁶ *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 141. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* §§ 686-700.

²⁷ Rev. St. § 5197 (U. S. Comp. St. 1901, p. 3493).

“Whether loans and discounts are identical, in the sense of section 5197, or not, is quite immaterial, for both are expressly made subject to the same rate of interest. And unquestionably the transfer of the notes, * * * if not a loan, was a discount.” *National Bank of Gloversville v. Johnson*, 104 U. S. 271, 26 L. Ed. 742. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 269; *Cent. Dig.* §§ 1014-1022.

²⁸ *Nicholson v. National Bank of New Castle*, 92 Ky. 251, 17 S. W. 627, 16 L. R. A. 223. See, also, *First Nat. Bank of Greenville v. Sherburne*, 14 Ill. App. 566; *First Nat. Bank of Rochester v. Pierson*, 24 Minn. 140, 31 Am. Rep. 341. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 269, 271; *Cent. Dig.* §§ 725-737, 978, 1014-1022.

²⁹ *Danforth v. National State Bank of Elizabeth*, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622. See minority opinion in *Lazear v. National Union Bank of Maryland*, 52 Md. 78, 36 Am. Rep. 355. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 269, 271; *Cent. Dig.* §§ 725-737, 978, 1014-1022.

Even were the purchase of negotiable paper by a national bank ultra vires, the violation could be availed of only in proceedings against the bank in the interest of the public to deprive it of its charter, and the maker or indorser cannot defend on that ground in an action by the bank.³⁰ And so of state banks under similar provisions of statute.³¹

Rights and Liabilities of Bank as to Paper Discounted

A bank may, of course, retain discounted paper in its hands, or make any other disposition of it,³² as by transferring or rediscounting it.³³ Like any other holder of negotiable paper, the bank, if it takes in good faith and for value and without notice, is entitled to the privileges of a holder in due course, and the same rules in respect to notice apply to it as to other holders.³⁴ Being a purchaser, and not a mere agent for collection, the bank may hold the customer as indorser, although it fails upon dishonor of the paper to charge

³⁰ *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88; *Prescott Nat. Bank of Lowell v. Butler*, 157 Mass. 548, 32 N. E. 909; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 101, 261; *Cent. Dig.* §§ 237, 238, 994.

³¹ *Neilsville Bank v. Tuthill*, 4 Dak. 295, 30 N. W. 154. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 101, 178; *Cent. Dig.* §§ 237, 238, 656-666.

³² *Farmers' & Mechanics' Bank v. Parker*, 37 N. Y. 148. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 183; *Cent. Dig.* §§ 701-705.

³³ *Planter's Bank v. Sharp*, 6 How. 301, 12 L. Ed. 447; *United States Nat. Bank v. First Nat. Bank*, 79 Fed. 296, 24 C. C. A. 597; *Auten v. United States Nat. Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; *Davenport v. Stone*, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467; *Marvine v. Hymers*, 12 N. Y. 223. But see *McIntyre v. Ingraham*, 35 Miss. 25. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 183; *Cent. Dig.* §§ 701-705.

³⁴ *Auten v. United States Nat. Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; *Lemoine v. Bank of North America*, Fed. Cas. No. 8,240, 3 Dill. 44; *Warren Deposit Bank v. Younglove*, 112 Ky. 767, 66 S. W. 749. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 183; *Cent. Dig.* §§ 701-705.

other indorsers.³⁵ Like any other person who negotiates a negotiable instrument, one who procures such paper to be discounted warrants the genuineness of prior signatures.³⁶ If the holder procures the discount of paper by false representations as to the solvency of the maker, the bank may rescind the discount and charge back the credit.³⁷

RATE OF INTEREST—USURY

61. IN GENERAL—Unless a different rate is provided for banks, they are subject to the general laws of the state in which they are incorporated or do business, fixing the rate of interest that may be charged for the loan of money and prescribing penalties for usury.

62. NATIONAL BANKS—A national bank may charge on loans and discounts interest at the rate allowed by the laws of the state where the bank is located; but if a higher rate is there allowed to banks of issue, that rate may be charged, and if no rate is there fixed, the bank may charge a rate not exceeding 7 per cent. Knowingly charging in excess of the rate allowed works a forfeiture of the entire interest; and if greater interest has been actually paid, the person who paid it may recover back twice the amount of the interest paid.

³⁵ *Lake v. Artisans' Bank*, 17 Abb. Prac. (N. Y.) 232. See "*Banks and Banking*," *Dec. Dig. (Key. No.)* § 183; *Cent. Dig.* §§ 701-705.

³⁶ *President, etc., of Cabot Bank v. Morton*, 4 Gray (Mass.) 156. See, also, *State Bank v. Fearing*, 16 Pick. (Mass.) 533, 28 Am. Dec. 265. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 183; *Cent. Dig.* §§ 701-705.

³⁷ *Bank of Antigo v. Union Trust Co.*, 50 Ill. App. 434; *Kling v. Irving Nat. Bank*, 21 App. Div. 373, 47 N. Y. Supp. 528; *Flatow v. Jefferson Bank*, 135 App. Div. 24, 119 N. Y. Supp. 860. See "*Banks*

Limitation as to Rate in General

In most states there are usury laws prescribing the rate of interest that may lawfully be charged for the loan or forbearance of money. These laws apply to loans by banks as well as to others, unless the rate which may be charged by banks is otherwise regulated by general laws or by charter.³⁸ Usury laws, so far, at least, as they are of general application, do not as a rule apply to the purchase of negotiable paper at a discount greater than the legal rate of interest; the transaction being a sale, and not a loan.³⁹ Laws which provide the rate of interest that may lawfully be charged by banks ordinarily in terms cover discounts as well as loans.⁴⁰

What Constitutes Usury

If upon a loan or discount more than the lawful rate is intentionally reserved, the transaction, whatever form is given to it, is usurious.⁴¹ Thus, where upon a discount in lieu of money the bank delivered its post notes, payable at a future day without interest, the notes being at a discount in the mar-

and Banking," Dec. Dig. (Key No.) §§ 183, 186; Cent. Dig. §§ 701-705, 719.

³⁸ *Bank of Alexandria v. Mandeville*, Fed. Cas. No. 850, 1 Cranch, C. C. 552; *Lumberman's Bank v. Bearce*, 41 Me. 505; *Ritenour v. Harrison*, 57 Mo. 502; *Creed v. Commercial Bank of Cincinnati*, 11 Ohio, 489; *Stribbling v. Bank of Valley*, 26 Va. 132; *Rock River Bank v. Sherwood*, 10 Wis. 230, 78 Am. Dec. 669; *Durkee v. City Bank of Kenosha*, 13 Wis. 216.

Authority in a charter to charge such rate as may be agreed upon does not authorize charging a rate unlawful for others. *Tishimingo Sav. Inst. v. Buchanan*, 60 Miss. 496; *Simonton v. Lanier*, 71 N. C. 498. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 181; Cent. Dig. §§ 686-700.*

³⁹ *Clark, Contracts* (2d Ed.) 271.

It seems, however, that such laws apply to discounts by way of purchase by banks. See *Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 141. But see *Bank of Louisiana v. Briscoe*, 3 La. Ann. 157. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 181; Cent. Dig. §§ 686-700.*

⁴⁰ *Post*, p. 241.

⁴¹ *Clark, Contracts* (2d Ed.) 271.

ket, the transaction was usurious.⁴² So, where the bank took a note payable in coin for the face amount of depreciated state bank notes loaned, whereby the bank obtained a greater profit than the lawful rate.⁴³ There must, however, be an intention to charge the greater rate.⁴⁴ Reserving a higher rate under the guise of a commission is usurious.⁴⁵ But the bank may deduct in addition the current exchange upon discount of a bill payable in another place.⁴⁶ A bank may deduct in advance legal interest upon the amount evidenced by the paper; in other words, it may take the customary bank discount, although it actually receives thereby a rate slightly in excess of the legal rate of interest, the custom being established and universally recognized.⁴⁷

⁴² *Gaither v. Farmers' & M. Bank, Use of Corcorran*, 1 Pet. 44, 7 L. Ed. 43.

Otherwise where it delivers its bank bills, although they are at a discount. *Maury v. Ingraham*, 28 Miss. 171. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 181; Cent. Dig. §§ 686-700*.

⁴³ *Bank of United States v. Owens*, 2 Pet. 527, 7 L. Ed. 508. See, also, *Bank of State of North Carolina v. Ford*, 27 N. C. 692. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 181; Cent. Dig. §§ 686-700*.

⁴⁴ *Bank of United States v. Waggener*, 9 Pet. 378, 9 L. Ed. 163; *Timberlake v. First Nat. Bank (C. C.)* 43 Fed. 231. Otherwise under some statutes. *Carolina Sav. Bank v. Parrott*, 30 S. C. 61, 8 S. E. 199. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 181; Cent. Dig. §§ 686-700*.

⁴⁵ *Union Nat. Bank of Chicago v. Louisville, N. A. & C. Ry. Co.*, 145 Ill. 208, 34 N. E. 135; *Olmstead v. New England Mortg. Sec. Co.*, 11 Neb. 487, 9 N. W. 650. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 181; Cent. Dig. §§ 686-700*.

⁴⁶ *President, etc., of Portland Bank v. Storer*, 7 Mass. 433; *Farmers' Bank v. Garten*, 34 Mo. 119; *Marvine v. Hymers*, 12 N. Y. 223; *International Bank v. Bradley*, 19 N. Y. 245; *Central Bank of Wisconsin v. St. John*, 17 Wis. 157. See, also, *Farmers' & Mechanics' Bank v. Parker*, 37 N. Y. 148; post, p. 242. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 181; Cent. Dig. §§ 686-700*.

⁴⁷ *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; *Bank of Alexandria v. Mandeville*, Fed. Cas. No. 850, 1

Effect of Usury

The effect of usury differs under different statutes. By some statutes or charters the contract on which the usury is charged is void.⁴⁸ In such case the usury defeats an action upon paper discounted, even against a holder in due course, unless an exception is made by the statute in his favor. Under other statutes a usurious contract is not void, but the entire interest is forfeited.⁴⁹ Such is the provision of the National Bank Act.⁵⁰ Under other statutes only the excess of the interest charged is forfeited, and the legal amount is nevertheless recoverable.⁵¹

Where a bank makes a loan at a rate prohibited by its charter or the law under which it is incorporated, it cannot recover in the courts of that state more than the lawful rate, although the contract was made in another state where the higher rate was authorized; ⁵² but in cases where action has been brought

Cranch, C. C. 552; *Newell v. National Bank of Somerset*, 12 Bush (Ky.) 57; *Warren Deposit Bank v. Robinson's Adm'rs* (Ky.) 35 S. W. 275; *President, etc., of Maine Bank v. Butts*, 9 Mass. 49; *President, etc., of Agricultural Bank v. Bissell*, 12 Pick. (Mass.) 586. Cf. *Branch Bank at Mobile v. Strother*, 15 Ala. 51. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* §§ 686-700.

⁴⁸ See *Bank of United States v. Owens*, 2 Pet. 537, 7 L. Ed. 508; *Youngblood v. Birmingham Trust & Sav. Co.*, 95 Ala. 521, 12 South. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245; *Seneca County Bank v. Lamb*, 26 Barb. (N. Y.) 595; *Miami Exporting Co. v. Clark*, 13 Ohio, 1. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* §§ 686-700.

⁴⁹ See *President, etc., of Planters' Bank of Mississippi v. Sharp*, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* §§ 686-700.

⁵⁰ Post, p. 239.

⁵¹ See *McLean v. LaFayette Bank*, Fed. Cas. No. 8,888, 3 McLean, 587; *Veazie Bank v. Paulk*, 40 Me. 109; *Chafin v. Lincoln Sav. Bank*, 7 Heisk. (Tenn.) 499. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* §§ 686-700.

⁵² *Ewing v. Toledo Sav. Bank*, 43 Ohio St. 31, 1 N. E. 138; *Farmers' Bank v. Burchard*, 33 Vt. 346.

A note dated and signed in Tennessee, and payable in Chicago,

in the state where the contract was made, it has been held that the rate there allowed could be recovered.⁵³

Interest Chargeable by National Banks

By the provisions of the National Bank Act, a national bank may charge on any loan or discount, or on any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state where the bank is located, except that if by the state law a different rate is limited for banks of issue that rate shall be allowed for national banks in the state, and if no rate is fixed by the state law the bank may charge a rate not exceeding 7 per cent., which may be taken in advance for the time the evidence of debt has to run. Knowingly charging a higher rate than is allowed, as above, works a forfeiture of the entire interest; and if the greater interest has been paid, twice that amount may be recovered back.⁵⁴

The above provisions, imposing penalties upon national banks for taking usury, supersede state laws upon the subject.⁵⁵ Therefore, while they provide that the rate of interest chargeable is that allowed by the state law, the provisions of the

Ill., and forwarded by the makers to the payees there, and discounted there by a bank, was governed by the laws of Illinois relating to usury. *Buchanan v. Drovers' Nat. Bank of Chicago*, 55 Fed. 223, 5 C. C. A. 83. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* §§ 686-700.

⁵³ *Hitchcock's Heirs v. United States Bank of Pennsylvania*, 7 Ala. 386; *Frazier v. Willcox*, 4 Rob. (La.) 517; *Erwin v. Lowry*, 6 Rob. (La.) 28; *Knox v. Bank of United States*, 26 Miss. 655. See "*Banks and Banking*," *Dec. (Key No.)* § 181; *Cent. Dig.* §§ 686-700.

⁵⁴ *Rev. St. U. S.* §§ 5197, 5198 (*U. S. Comp. St.* 1901, p. 3493).

⁵⁵ *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146; *Hintermister v. First Nat. Bank of Chittemango*, 64 N. Y. 212 (*First National Bank of Whitehall v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438, and *Farmers' Bank of Fayetteville v. Hale*, 59 N. Y. 53, having been overruled by *Farmers' & M. Nat. Bank v. Dearing*, *supra*). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1045.

act are exclusive so far as concerns the penalties of usury,⁵⁶ and the forfeiture is confined to the interest, although by the state law the penalty may be forfeiture of the entire debt.⁵⁷ The only remedies available against a national bank for usury are those prescribed by the act.⁵⁸ Except for the forfeiture of interest, the rights of the bank against prior parties upon paper discounted at a usurious rate are unimpaired.⁵⁹

Same—What Rate may be Charged

A national bank is permitted, as a rule, to charge interest at the rate and at no higher rate than that fixed and allowed for individuals and other banks by the law of the state where the bank is situated.⁶⁰ In one respect, however, national banks are upon a different footing than state banks, for, if the rate of interest allowed generally is higher than that allowed to state banks of issue, national banks are entitled to the higher rate, since the exception, that "where a different rate is limited for banks of issue organized under state laws the rate so limited shall be allowed for" national banks speaks of "allowance" to national banks and of "limitation" upon state banks, but does not declare that the rate limited to the latter

⁵⁶ *First Nat. Bank of Columbus v. Garlinghouse*, 22 Ohio St. 492, 10 Am. Rep. 751. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1045.

⁵⁷ *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1045.

⁵⁸ *Wiley v. Starbuck*, 44 Ind. 298. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1045.

⁵⁹ *First Nat. Bank of Dalton v. McEntire*, 112 Ga. 232, 37 S. E. 381; *Nicholson v. Newcastle Nat. Bank*, 92 Ky. 251, 17 S. W. 627, 16 L. R. A. 223.

A bank to whom a note is indorsed for value is a bona fide holder, although it takes usurious interest. *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. Ed. 580. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1045.

⁶⁰ *Tiffany v. National Bank of Missouri*, 18 Wall. 409, 21 L. Ed. 862; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *La Dow v. First Nat. Bank*, 51 Ohio St. 234, 37 N. E. 11.

shall be the maximum rate allowed to the former.⁶¹ Under the provision that, "when no rate is fixed" by the state law, the bank may charge a rate not exceeding 7 per cent., a national bank is not limited to that rate if the state law permits persons to contract at any rate they may agree upon, since the bank may charge the rate "allowed" by the laws of the state, and "fixed" must be construed to mean "allowed."⁶²

Same—Discounts

The limitation upon the rate of interest applies to discounts as well as to loans;⁶³ and it seems that the fact that the paper is transferred by delivery or by indorsement without re-

By compounding interest oftener than permitted by the state law, a national bank charges higher interest than that allowed by the laws of the state, although the compounded interest is less than the state law permits to be charged directly, without compounding. *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 25 Sup. Ct. 49, 49 L. Ed. 238. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023, 1028.

⁶¹ *Tiffany v. National Bank of Missouri*, 18 Wall. 409, 21 L. Ed. 862.

Banks created by special acts, to which the power to issue circulating notes is not specifically granted, are not banks of issue. *First Nat. Bank of Clarion v. Gruber*, 87 Pa. 468, 30 Am. Rep. 378.

A national bank may charge the rate allowed to state banks incorporated by special acts. *First Nat. Bank of Mount Pleasant v. Duncan*, Fed. Cas. No. 4,804; *First Nat. Bank of Mount Pleasant v. Tinstman*, Fed. Cas. No. 4,805. But see *First Nat. Bank of Clarion v. Gruber*, *supra*. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1045.

⁶² *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 20 Sup. Ct. 732, 44 L. Ed. 882 (where a state law allowed parties to agree on any rate, and in default of agreement to take 7 per cent.). See, also, *California Nat. Bank of San Diego v. Ginty*, 108 Cal. 148, 41 Pac. 38; *Rockwell v. Farmers' Nat. Bank*, 4 Colo. App. 562, 36 Pac. 905; *Guild v. First Nat. Bank*, 4 S. D. 566, 57 N. W. 499; *Jefferson Nat. Bank v. Bruhn*, 64 Tex. 571, 53 Am. Rep. 771; *Wolverton v. Exchange Nat. Bank*, 11 Wash. 94, 39 Pac. 247. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1045.

⁶³ *National Bank of Gloversville v. Johnson*, 104 U. S. 271, 26 L. Ed. 742; *Johnson v. National Bank of Gloversville*, 74 N. Y. 329, 30

course will not take the case out of the statute.⁶⁴ Upon the purchase or discount of a bill of exchange payable at another place the current rate of exchange for sight drafts may be charged in addition to the interest.⁶⁵

Same—Forfeiture of Interest

If the interest exceeds the lawful rate, it is forfeited, and only the amount less the interest unlawfully reserved can be recovered.⁶⁶ Such forfeiture includes interest occurring after maturity, as well as interest included in a note in renewal of a usurious loan.⁶⁷ The forfeiture can be enforced only in an action to collect the principal, by way of defense.⁶⁸

Am. Rep. 302; ante, p. 236. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 270; *Cent. Dig.* § 1025.

⁶⁴ Danforth v. National State Bank of Elizabeth, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622. But see National Bank of Gloversville v. Johnson, 104 U. S. 271, 26 L. Ed. 742; ante, p. 233. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 270; *Cent. Dig.* §§ 1025, 1028.

⁶⁵ Rev. St. U. S. § 5197 (U. S. Comp. St. 1901, p. 3493). See Wheeler v. Union Nat. Bank, 96 U. S. 268, 24 L. Ed. 833. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 270; *Cent. Dig.* § 1024.

⁶⁶ Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; National Bank of Madison v. Davis, Fed. Cas. No. 10,038, 8 Biss. 100. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 270; *Cent. Dig.* §§ 1023-1045.

⁶⁷ Brown v. Marion Nat. Bank, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801; First Nat. Bank v. Stauffer (C. C.) 1 Fed. 187; Farmers' & Mechanics' Bank v. Hoagland (C. C.) 7 Fed. 159; Danforth v. National State Bank of Elizabeth, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622; First Nat. Bank of Peterborough v. Childs, 133 Mass. 248, 43 Am. Rep. 509; Shunk v. First Nat. Bank of Galion, 22 Ohio St. 508, 10 Am. Rep. 762. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 270; *Cent. Dig.* §§ 1023-1045.

⁶⁸ First Nat. Bank of Peterborough v. Childs, 130 Mass. 519, 39 Am. Rep. 474; Hintermister v. First Nat. Bank of Chittenango, 64 N. Y. 212; Brown v. Second Nat. Bank of Erie, 72 Pa. 209.

Where usury is pleaded, the bank cannot avoid forfeiture of the entire interest by then electing to remit the excessive interest. Citizens' Nat. Bank v. Donnell, 195 U. S. 369, 25 Sup. Ct. 49, 49 L. Ed. 238. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 270; *Cent. Dig.* §§ 1023-1045.

Inasmuch as the forfeiture is of the entire interest which the evidence of debt carries with it, where paper has been discounted by way of purchase by the bank it cannot recover interest thereon from any one, even from one who was not a party to the usurious transaction, as a maker or acceptor.⁶⁹

Same—Recovery of Interest Paid

If the greater rate of interest has actually been paid, the person by whom it was paid, or his representatives, may, in an action in the nature of debt, recover twice the amount from the bank taking or receiving it; that is, twice the amount of interest paid, and not merely the excess over the legal rate.⁷⁰ The payment must be an actual payment, and not a further promise to pay.⁷¹ The recovery can be had only by action in the manner provided by the act. When illegal interest has

⁶⁹ *Danforth v. National State Bank of Elizabeth*, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622; *National Bank of Auburn v. Lewis*, 75 N. Y. 516, 31 Am. Rep. 484; *Guthrie v. Reid*, 107 Pa. 251; *Trabue v. Cook* (Tex. Civ. App.) 124 S. W. 455. Contra: *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 141; *Importers' & Traders' Nat. Bank v. Littell*, 47 N. J. Law, 233. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1045.

⁷⁰ *First Nat. Bank v. Watt*, 184 U. S. 151, 22 Sup. Ct. 457, 46 L. Ed. 475; *Hill v. National Bank (C. C.)* 15 Fed. 432; *First Nat. Bank of Hutchinson v. McInturff*, 3 Kan. App. 536, 43 Pac. 839; *Second Nat. Bank v. Fitzpatrick*, 111 Ky. 228, 63 S. W. 459, 62 L. R. A. 599; *Schuyler National Bank v. Bollong*, 28 Neb. 684, 45 N. W. 164; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65. Contra: *Hintermister v. First Nat. Bank of Chittenango*, 64 N. Y. 212; *Bobo v. People's Nat. Bank*, 92 Tenn. 444, 22 S. W. 888. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1046-1053.

⁷¹ *Brown v. Marion Nat. Bank*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801; *First Nat. Bank of Jacksboro v. Lasater*, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408.

No recovery of twice the amount of usurious interest paid can be had on the theory that because in a decree of foreclosure, in which was deducted from the sum sued for the interest charged in excess of the legal rate, was included the remaining legal interest, illegal interest was paid by a sale under foreclosure under such decree. *Talbot v. First Nat. Bank*, 185 U. S. 172, 22 Sup. Ct. 612, 46 L. Ed.

been paid upon a discount of paper, it cannot in an action by the bank on the paper be applied by way of set-off or payment, nor can double the amount be allowed by way of counterclaim.⁷² The action must be commenced within two years from the time the usurious transaction occurred; that is, from the time the usurious interest is paid,⁷³ or judgment therefor is entered.⁷⁴ This limitation does not apply to the right to set up a forfeiture of interest in an action by the bank.⁷⁵ In

857. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1046-1053.

⁷² *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. Ed. 212; *Driesbach v. Second Nat. Bank*, 104 U. S. 52, 26 L. Ed. 658; *Stephens v. Monongahela National Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399; *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 22 Sup. Ct. 50, 46 L. Ed. 117; *First Nat. Bank of Peterborough v. Childs*, 133 Mass. 248, 43 Am. Rep. 509; *First Nat. Bank of Clarion v. Gruber*, 91 Pa. 377; *National Bank of Fayette Co. v. Dushane*, 96 Pa. 340 (the contrary holding of earlier Pennsylvania cases having been overruled by *Barnet v. Muncie Nat. Bank*, *supra*).

A controversy concerning interest paid on a note held by a national bank, secured by collateral, arising in a suit to foreclose the mortgage, was governed by the National Bank Act, although the mortgage securing the note was executed in favor of the bank president. *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1053.

⁷³ *First Nat. Bank of Dorchester v. Smith*, 36 Neb. 199, 54 N. W. 254; *Stephens v. Monongahela Nat. Bank*, 88 Pa. 157, 32 Am. Rep. 438; *Stout v. Ennis National Bank*, 69 Tex. 384, 8 S. W. 808.

Upon a discount, where the net proceeds, after deducting usurious interest, are credited to the transferor of the paper, this is payment of interest. *National Bank of Rahway v. Carpenter*, 52 N. J. Law, 165, 19 Atl. 181. See, also, *Bobo v. People's Nat. Bank*, 92 Tenn. 444, 21 S. W. 888. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1053.

⁷⁴ *Duncan v. First Nat. Bank of Mt. Pleasant*, Fed. Cas. No. 4,135; *First Nat. Bank v. Denson*, 115 Ala. 650, 22 South. 518. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 270; *Cent. Dig.* §§ 1023-1053.

⁷⁵ *Pickett v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346; *First Nat. Bank of Peterborough v. Childs*, 130 Mass. 519, 39 Am.

the absence of agreement to the contrary, any part payment of a usurious loan will be regarded as payment of the principal, and not of the interest.⁷⁶ An action against the bank may be brought in the state as well as in the federal courts.⁷⁷

Same—Discount of Paper Void for Usury by State Law

A peculiar case is presented where a state law provides that all usurious instruments shall be void, and a national bank purchases such an instrument from the holder at a legal rate of discount. Such a case is not covered by any provision of the National Bank Act, which merely prescribes penalties when the bank knowingly takes, receives, charges, or reserves on any loan or discount made, or upon any evidence of debt, a rate of interest greater than by the act allowed. It would seem, therefore, that the bank, even if without notice of the usurious inception of the instrument, like any other purchaser, takes it as void paper.⁷⁸ A different construction, however, has been placed upon the act by a divided court, in New York,

Rep. 474. See "*Banks and Banking*," Dec. Dig. (Key No.) § 270; Cent. Dig. §§ 1023-1053.

⁷⁶ Danforth v. National State Bank of Elizabeth, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622; First Nat. Bank of Newton v. Turner, 3 Kan. App. 352, 42 Pac. 936; Hall v. First Nat. Bank of Fairfield, 30 Neb. 99, 46 N. W. 150; Cadiz Bank v. Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364; McCarthy v. First Nat. Bank of Rapid City, 23 S. D. 269, 121 N. W. 853, 23 L. R. A. (N. S.) 335; Stout v. Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808. See "*Banks and Banking*," Dec. Dig. (Key No.) § 270; Cent. Dig. §§ 1023-1053.

⁷⁷ Claffin v. Houseman, 93 U. S. 130, 23 L. Ed. 833; Pickett v. Merchants' Nat. Bank of Memphis, 32 Ark. 346; Ordway v. Central Nat. Bank of Baltimore, 47 Md. 217, 28 Am. Rep. 455; Endres v. First Nat. Bank, 66 Minn. 257, 68 N. W. 1092; Bletz v. Columbia Nat. Bank, 87 Pa. 87, 30 Am. Rep. 343; Dow v. Irasburgh Nat. Bank of Orleans, 50 Vt. 112, 28 Am. Rep. 493. As to review by United States Supreme Court, see Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 14 Sup. Ct. 24, 37 L. Ed. 1008. See "*Banks and Banking*," Dec. Dig. (Key No.) § 270; Cent. Dig. §§ 1046-1053.

⁷⁸ See Traders' Nat. Bank v. Chipman, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461. See "*Banks and Banking*," Dec. Dig. (Key No.) § 270; Cent. Dig. §§ 1023-1053.

where the law provides that usurious instruments shall be void, but also that state banks shall be subject to the same usury laws as national banks. It was held that such an instrument, when discounted by a national bank, and consequently when discounted by a state bank, at a legal rate, may be enforced against prior parties, if the bank was without notice of its usurious inception.⁷⁹ The decision is based upon the ground that the National Bank Act, limiting the rate of interest national banks may charge and imposing penalties for usury, supersedes all state laws on the subject of usury as applied to national banks.⁸⁰ If the scope of the act is so broad as to embrace even transactions where there is no usury on the part of the bank, it would logically follow that such an instrument could be enforced by the bank, if it had notice of the prior usury; but it has been held in a later case that if the bank purchases with notice it takes subject to the defense of usury.⁸¹

COLLATERAL SECURITY

63. IN GENERAL—Unless expressly restricted, a bank having power to lend money may take as collateral security for a loan any property, personal or real.

⁷⁹ *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619. See, also, *Schlesinger v. Kelly*, 114 App. Div. 546, 99 N. Y. Supp. 1083; *Slade v. Bennett*, 133 App. Div. 666, 118 N. Y. Supp. 278. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* §§ 686-700.

⁸⁰ *Ante*, p. 239.

⁸¹ *Schlesinger v. Lehmaier*, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591.

The decisions can be justified and reconciled under Negotiable Instruments Law, §§ 55, 57. Some of the judges in both cases (*Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619, and *Schlesinger v. Lehmaier*) rest their decisions upon that law, and, indeed, it seems to have controlled the decision of the majority in *Schlesinger v. Lehmaier*, *supra*. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 181, 270; *Cent. Dig.* §§ 686-700, 1023-1053.

64. **BANK'S OWN STOCK**—Banks are often prohibited from making loans on the security of their own stock. National banks are prohibited from making loans or discounts on the security of their own stock, unless such security be necessary to prevent loss upon debts previously contracted in good faith; but if this prohibition can be urged against the validity of such an unauthorized transaction by any one except the sovereign, it cannot be done after the contract has been executed, and the proceeds applied to payment.

65. **REAL ESTATE MORTGAGE**—Banks are often prohibited from making loans upon the security of a real estate mortgage. National banks are authorized to take such mortgages only by way of security for debts previously contracted in good faith; but the want of authority to take a mortgage for a concurrent loan or for future advances can be urged only by the sovereign in a proceeding against the bank for violation of its charter.

In General—Personal Security

The power to loan naturally carries with it the power to loan on collateral security, and unless a bank be prohibited so to do it may take as security any property, personal⁸² or real.⁸³ Sometimes banks are restrained from lending on particular classes of securities; but, even when such loans are made, it is generally held that the borrower cannot avail himself of the violation of law as a defense, and that the only

⁸² *Deloach v. Jones*, 18 La. 447 (a crop of cotton); *Commercial Bank of Manchester v. Nolan*, 7 How. (Miss.) 508. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 179; *Cent. Dig.* §§ 667-683.

⁸³ *Post*, p. 250. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 179; *Cent. Dig.* §§ 667-683.

penalty therefor is such as may be imposed on the bank at the suit of the sovereign.⁸⁴

National Banks

Among the powers conferred on national banks is that of "loaning money on personal security."⁸⁵ The words "personal security" are used in contradistinction to real estate security, and the bank "may take a pledge of bonds, choses in action, bills of lading, or other personal chattels."⁸⁶

Shares of Stock in Other Corporations

It is the general rule that banks, like other corporations, have no power, unless expressly authorized, to purchase stock in another corporation;⁸⁷ but a bank having power to lend money may accept such stock as security for a loan.⁸⁸ Thus, the power to buy and sell stocks is not conferred upon national banks;⁸⁹ but, as incidental to the power to loan money on personal security, a national bank may accept stock of another corporation as collateral security, and by the enforcement of its rights as pledgee may become the owner of the collateral,

⁸⁴ *Allen v. Freedman's Savings & Trust Co.*, 14 Fla. 418; ante, pp. 227, 234; post, pp. 250, 252. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 179; *Cent. Dig.* §§ 667-683.

⁸⁵ Rev. St. U. S. § 5136 (U. S. Comp. St. 1901, p. 3455). See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 269; *Cent. Dig.* § 1016.

⁸⁶ *Pittsburgh Locomotive & Car Works v. State Nat. Bank of Keokuk*, Fed. Cas. No. 11,198 (locomotive). See, also, *Third Nat. Bank of Baltimore v. Boyd*, 44 Md. 47, 22 Am. Rep. 35 (bonds); *Cleveland v. Shoeman*, 40 Ohio St. 176 (warehouse receipt).

A bank may take a chattel mortgage to secure a previous debt. *Spafford v. First Nat. Bank of Tama City*, 37 Iowa, 181, 18 Am. Rep. 6. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 269; *Cent. Dig.* § 1016.

⁸⁷ Post, p. 277.

⁸⁸ But see *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*, 36 Ohio St. 350, 38 Am. Rep. 594. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 179; *Cent. Dig.* §§ 667-683.

⁸⁹ Post, p. 278.

as well as be subject to liability as other stockholders.⁹⁰ So a national bank may accept in good faith stock of another corporation as security for a previous indebtedness.⁹¹

Shares of Bank's Own Stock

Banks are often prohibited from making any loan or discount on the security of, as well as from purchasing, their own stock.⁹²

The National Bank Act provides that no bank shall make any loan or discount on the security of the shares of its own capital stock, nor be purchaser or holder of any such shares, unless necessary to prevent loss upon a debt previously contracted in good faith, and that stock so purchased or acquired shall within six months be sold, or in default thereof a receiver may be appointed.⁹³ Under the foregoing provisions a bank may make a loan or discount on the security of its own stock only when necessary to prevent loss on debts previously contracted in good faith.⁹⁴ The placing by one bank of its

⁹⁰ *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Shoemaker v. National Mechanics' Bank*, Fed. Cas. No. 12,801; *Canfield v. State Nat. Bank of Minneapolis*, Fed. Cas. No. 2,382; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 62 Atl. 971, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637. See, also, *California Bank v. Kennedy*, 167 U. S. 362, 366, 17 Sup. Ct. 831, 833, 42 L. Ed. 198. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 269; *Cent. Dig.* § 1016.

⁹¹ *Post*, p. 278.

⁹² See *Vansands v. Middlesex County Bank*, 26 Conn. 144; *Batthey v. Eureka Bank*, 62 Kan. 384, 63 Pac. 437.

Where it was agreed between a bank and defendant that he should buy on the market certain shares of its stock for its benefit, the bank to lend the money on his note, and to hold the stock and renew the note till the stock could be sold, the note to be an obligation, the agreement being in violation of the statute was no defense to an action on the note. *St. Paul & M. Trust Co. v. Jenks*, 57 Minn. 248, 59 N. W. 299. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 91, 179, 180; *Cent. Dig.* §§ 225, 679, 684-685½.

⁹³ Rev. St. U. S. § 5201 (U. S. Comp. St. 1901, p. 3494).

⁹⁴ *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172. See

funds on permanent deposit is a loan within this prohibition.⁹⁵ But if the prohibition against loans by a bank upon the shares of its own stock can be urged against the validity of such a transaction by any one except the government, it can be done only before the contract is executed, and while the security is subsisting in the hands of the bank; and when the contract has been executed, and the proceeds applied to payment of the debt, the courts will not interfere.⁹⁶

Real Estate Mortgage

In the absence of prohibition in its charter, a bank has the implied power to take a mortgage on real estate to secure a loan.⁹⁷ Sometimes the power is expressly granted,⁹⁸ and some-

"Banks and Banking," Dec. Dig. (Key No.) §§ 179, 180; Cent. Dig. §§ 667-685½.

⁹⁵ *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172. Where plaintiff purchased shares and received from the holder certificates regularly assigned, the certificates declaring the holder to be owner and that they were transferable on the books only on the surrender of the certificates, and the bank refused to transfer the stock on the books on the ground that the shares had been pledged to it by the holder as security for deposits made by it to him, and had been sold and transferred to others under a power from the holder before the bank had notice of plaintiff's purchase, an action by the purchaser for damages lay, and, the pledge being illegal, the previous transfer was no defense. *First Nat. Bank v. Lanier*, supra. See, also, *Bullard v. National Eagle Bank*, 18 Wall. 589, 21 L. Ed. 923. See *"Banks and Banking," Dec. Dig. (Key No.) §§ 179, 180; Cent. Dig. §§ 667-685½.*

⁹⁶ *First Nat. Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592; post, p. 279. See *"Banks and Banking," Dec. Dig. (Key No.) § 261; Cent. Dig. § 999.*

⁹⁷ *Bank of Martinez v. Hemme Orchard & Land Co.*, 105 Cal. 376, 38 Pac. 963; *Crocker v. Whitney*, 71 N. Y. 161 (to secure anticipated liabilities). See, also, *Alexander v. Brummett* (Tenn.) 42 S. W. 63. See *"Banks and Banking," Dec. Dig. (Key No.) § 179; Cent. Dig. §§ 667-672.*

⁹⁸ *Dunn v. O'Connor*, 25 App. Div. 73, 49 N. Y. Supp. 270; *Merchants' State Bank of Fargo v. Tufts*, 14 N. D. 238, 103 N. W. 760, 116 Am. St. Rep. 682 ("by way of security for loans or for debts previously contracted"); *Bennet v. Union Bank*, 5 Humph. (Tenn.) 612.

times it is withheld. Sometimes the power conferred is simply to take mortgages to secure debts previously contracted.⁹⁹ Where a bank has the power to take a mortgage, it may, of course, foreclose and realize upon the security.¹⁰⁰

Same—National Banks

The power of national banks to hold and convey real estate is restricted; but they are expressly authorized to hold such as shall be mortgaged in good faith by way of security for debts previously contracted, and such as they shall purchase under mortgages held by them.¹⁰¹ A national bank may, therefore, lawfully take a real estate mortgage as security for a loan previously made, and, it seems, may lawfully take a mortgage as security for a concurrent loan, if the title be not thereby vested in the bank, as upon the assignment of a note with a deed of trust securing it;¹⁰² but the bank is forbidden, either for a concurrent loan or for future advances,¹⁰³ to take

See "Banks and Banking," Dec. Dig. (Key No.) § 179; Cent. Dig. §§ 667-672.

⁹⁹ *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370 (holding a mortgage to secure a contemporaneous loan valid under such power). *See "Banks and Banking," Dec. Dig. (Key No.) § 179; Cent. Dig. §§ 667-672.*

¹⁰⁰ *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32. *See "Banks and Banking," Dec. Dig. (Key No.) § 179; Cent. Dig. §§ 667-683.*

¹⁰¹ Rev. St. U. S. § 5137 (U. S. Comp. St. 1901, p. 3460); post, p. 281.

A state statute invalidating transfers with a view to a preference by an insolvent does not conflict with this section, nor does it impair any function of national banks as instrumentalities of the federal government. *Traders' Nat. Bank v. Chipman*, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461. *See "Banks and Banking," Dec. Dig. (Key No.) § 269; Cent. Dig. § 1016.*

¹⁰² *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188. *See "Banks and Banking," Dec. Dig. (Key No.) §§ 259, 261, 269; Cent. Dig. §§ 980, 992, 1016.*

¹⁰³ *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188. *See Kansas Val. Nat. Bank v. Rowell*, Fed. Cas. No. 7,611, 2 Dill. 371. *See "Banks and Banking," Dec. Dig. (Key No.) §§ 259, 261, 269; Cent. Dig. §§ 980, 992, 1016.*

a mortgage which conveys to it the legal title to real estate. The effect of the prohibition, however, is not to avoid the transaction between the parties, and the bank may enforce the mortgage.¹⁰⁴ The sovereign alone can object. "The impending danger of a judgment of ouster and dissolution," the supreme court declared, "was, we think, the check, and none other, contemplated by Congress."¹⁰⁵

The bank may take back a purchase-money mortgage upon the sale of land lawfully held.¹⁰⁶

Bill of Lading Accompanying Draft Discounted

Where upon the shipment of goods the seller takes a bill of lading, and deals with it so as to secure the contract price, by drawing on the buyer for the amount, and obtaining a discount of the draft from a bank, to which the seller delivers the indorsed bill of lading attached, the bank acquires a special property in the goods to secure its advances, and the property in the goods does not pass to the buyer until acceptance or payment of the draft or tender of the price.¹⁰⁷ And the rule is the same where the seller takes a bill of lading

¹⁰⁴ *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 5 Sup. Ct. 234, 28 L. Ed. 764. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 259, 261, 269; *Cent. Dig.* §§ 980, 992, 1016.

¹⁰⁵ *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 259, 261; *Cent. Dig.* §§ 980, 992.

¹⁰⁶ *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355, 29 Am. Rep. 335; *First Nat. Bank of Memphis v. Kidd*, 20 Minn. 234 (Gil. 212). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 269; *Cent. Dig.* §§ 1014-1022.

¹⁰⁷ *Mirabita v. Bank*, 3 Exch. Div. 164; *Jenkyns v. Brown*, 14 Q. B. 496, 19 L. J. Q. B. 286; *Dows v. National Exch. Bank*, 91 U. S. 618, 23 L. Ed. 214; *American Nat. Bank v. Henderson*, 123 Ala. 612, 28 South. 498, 82 Am. St. Rep. 147; *Mather v. Gordon*, 77 Conn. 341, 59 Atl. 424; *Shaffer v. Rhynders*, 116 Iowa, 472, 89 N. W. 1099; *Halsey v. Warden*, 25 Kan. 128; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163; *First Nat. Bank of Chicago v. Bayley*, 115 Mass. 228;

making the goods deliverable to the buyer, and delivers it so attached to the bank which discounts the draft; the bank acquiring a special property in the goods to secure its advances.¹⁰⁸ In some cases it has been held that a bank which purchases a draft with a bill of lading attached, making the

Forbes v. Boston & L. R. Co., 133 Mass. 154; Security Bank of Minnesota v. Luttgen, 29 Minn. 363, 13 N. W. 151; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Commercial Bank of Keokuk v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311; In re Non-Magnetic Watch Co. of America, 89 Hun, 196, 34 N. Y. Supp. 1017; Third Nat. Bank of St. Louis v. Hays, 119 Tenn. 729, 108 S. W. 1060; Neill v. Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702. See, also, Walsh, Boyle & Co. v. First Nat. Bank of Hiawatha, Kan., 228 Ill. 446, 81 N. E. 1067.

Advances for the purchase of certain cattle were made by a bank, on the agreement by the parties to the sale that the bank should have a lien therefor on the cattle until they should be sold by consignees to whom they were to be shipped, and that a draft for the amount should be drawn on the consignees against the proceeds of the sale by them. Such draft was made and delivered to the bank, with a bill of lading for four car loads of the cattle; but no bill of lading was issued for the two remaining car loads, they being shipped in the name of a third person to enable him to procure a pass to accompany the bank's agent in charge of the shipment. The consignees, before selling the cattle, had notice of the bank's advances and of the draft and bill of lading, and no money was paid nor any right relinquished by them on account of the shipment. Held, that the consignees could not apply the proceeds of the sale to a prior debt of the consignor to them, as against the bank's lien, which was valid against them even as to the proceeds of the two car loads not included in the bill of lading. Means v. Bank of Randall, 146 U. S. 620, 13 Sup. Ct. 186, 36 L. Ed. 1107.

Where a shipper drew against his consignment for sale upon the consignees, with whom his account was overdrawn, and assigned the duplicate bill of lading to a bank, which discounted the draft, the consignees who received the property upon the original bill had no right to apply the goods or their proceeds in discharge of the shipper's liability to themselves arising from other transactions; the bank having acquired title to the consignment to the extent of the draft discounted on security thereof. First Nat. Bank of Batavia v. Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431. See, also, Drexel v. Pease, 133 N. Y. 129, 30 N. E. 732. See "*Banks and Banking*," Dec. Dig. (Key No.) § 179; Cent. Dig. §§ 676, 678.

¹⁰⁸ Merchants' Exch. Bank v. McGraw, 59 Fed. 972, 8 C. C. A. 420;

goods deliverable to the order of the consignor, assumes the obligation of the seller to deliver to the drawee according to the contract of sale the goods represented by the bill of lading;¹⁰⁹ but this doctrine is clearly erroneous. On principle, the bank under the assignment of the bill of lading takes the title of the seller only as security, and acquires substantially the interest of a mortgagee, his interest being discharged by payment of the debt, and he becomes subject to no liability to the buyer which he does not expressly assume; and this view is sustained by the weight of authority, including courts by which the contrary doctrine was formerly declared.¹¹⁰ A bank which in good faith discounts a draft with a bill of lading attached does not warrant the genuineness of the latter, and if the drawee pays the draft on the faith of the bill of lading,

Morse v. Chicago, R. I. & P. Ry. Co., 73 Iowa, 226, 34 N. W. 825; Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Greenwood Grocery Co. v. Canadian County Mill & Elevator Co., 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627. But see Bank of Litchfield v. Elliott, 83 Minn. 469, 86 N. W. 454.

Whether one to whom a bill of lading is indorsed as security is pledgee or mortgagee depends on the intention. Sewell v. Burdick, 10 L. R. App. Cas. 74.

It seems that a bank, which makes advances and takes the bill of lading to its own order, with authority to take possession and dispose of the goods for his security or reimbursement, is a mortgagee. See Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818; Mershon v. Wheeler, 76 Wis. 502, 45 N. W. 95. Cf. Moors v. Wyman, 146 Mass. 60, 15 N. E. 104; Moors v. Drury, 186 Mass. 424, 71 N. E. 810; In re New Haven Wire Co., 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300. See "*Banks and Banking*," Dec. Dig. (Key No.) § 179; Cent. Dig. §§ 676, 678.

¹⁰⁹ Haas & Co. v. Citizens' Bank of Dyersburg, 144 Ala. 562, 39 South. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61 (but see Bank of Guntersville v. Jones Cotton Co., 156 Ala. 525, 46 South. 971; First Nat. Bank of Birmingham v. Wilkesbarre Lace Mfg. Co., 162 Ala. 309, 50 South. 153); Searles v. Smith Grain Co., 80 Miss. 688, 32 South. 287. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 676, 678; Cent. Dig. § 179.

¹¹⁰ Tolerton & Stetson Co. v. Anglo-California Bank, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777; Hall v. Keller, 64 Kan. 211, 67 Pac. 518, 62 L. R. A. 758, 91 Am. St. Rep. 209; Central Mercantile

although it turns out to be forged, he has no recourse against the bank.¹¹¹

Lien on Collateral

While a bank has, as a rule, a general lien upon securities coming into its hands in the usual course of business, where securities are pledged with a bank to secure the payment of a particular loan, or to protect the bank in a particular transaction, in the absence of a special agreement, they are not subject to a general lien for a balance due the bank on general account.¹¹²

Co. v. Oklahoma State Bank, 83 Kan. 504, 112 Pac. 114, 33 L. R. A. (N. S.) 954; Mason v. A. E. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635; (overruling Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679); Lewis Leonhardt & Co. v. W. H. Small & Co., 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. (N. S.) 887, 119 Am. St. Rep. 994; S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944 (overruling Landa v. Lattin Bros., 19 Tex. Civ. App. 246, 46 S. W. 48); Blaisdell & Co. v. White & Co. (Tex. Civ. App.) 76 S. W. 70. See 49 L. R. A. 679, note; 1 L. R. A. (N. S.) 242, note; 14 Harv. Law Rev. 159. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 179; *Cent. Dig.* §§ 676, 678.

¹¹¹ Leather v. Simpson, 11 Eq. 298; Robinson v. Reynolds, 2 Q. B. 196; Hoffman v. Bank of Milwaukee, 12 Wall. 181, 20 L. Ed. 366; Goetz v. Bank of Kansas City, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515. See 4 Harv. Law Rev. 297, 303.

A draft directed the drawee to pay, and to charge the same to account of certain flax seed, forged duplicate bills of lading for which were attached to the draft. The acceptance was: "Accepted * * * against indorsed bills of lading" for the flax seed. Before arrival of the steamship on which was the flax seed, according to the bills of lading, and without knowledge that it was not there, or that the bills of lading were forged, the acceptor paid the draft. Held, that acceptance was conditioned on delivery of genuine bills of lading, and that this condition was not waived by payment without knowledge of the facts; so that, in the absence of special equities, the acceptor could recover the money paid. Guaranty Trust Co. of New York v. Grottrian, 114 Fed. 433, 52 C. C. A. 235, 57 L. R. A. 689. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 179; *Cent. Dig.* §§ 676, 678.

¹¹² Ante, p. 210.

CHAPTER VIII

BANK NOTES

66. Definition and Character.

67. Power to Issue.

DEFINITION AND CHARACTER

66. A bank note is a promissory note issued by a bank and payable to bearer upon demand. Bank notes are designed to circulate as a substitute for money, but they are not a legal tender, although they are a good tender, unless objected to on that ground. By weight of authority (though there are decisions to the contrary) a bank note must be presented for payment in order to charge the bank, and until presentment the statute of limitations does not begin to run, but in states which have adopted the Negotiable Instruments Law such presentment is not necessary.

POWER TO ISSUE

67. At common law bank notes might be issued by private bankers, but in this country this power to issue such notes has generally been confined to incorporated banks, and by virtue of a prohibitory tax imposed upon the notes of state banks and private bankers no bank notes other than those of national banks are issued.

In General

As has been already stated, the issue of bank notes for circulation as a substitute for money is not an essential function

of banking.¹ In this country it is to-day confined exclusively to national banks, not because there may not exist other banks which have the power to issue bank notes, but because all state banks and private bankers are practically excluded from the field of circulation by means of a tax of 10 per cent. imposed by the National Bank Act upon all notes of any person or of any state bank used for circulation and paid out by any bank, state or national.² As a result, much of the law upon the subject of bank notes has become practically obsolete.

Formal Requisites

A bank note, or bank bill, as the instrument is sometimes inaccurately termed,³ is in form simply a promissory note issued by a bank and payable to bearer usually upon demand. A bank note, issued by a bank and payable in the future, is termed a post note.⁴ The circulating notes of national banks are required to be payable on demand, and the banks are forbidden to issue post notes, or any other notes to circulate as money than such as are authorized by the National Bank Act.⁵

Bank Notes as Tender and Payment

Although bank notes are intended to circulate as a substitute for money, they are not money; that is, legal tender. Under the federal constitution, providing that no state shall make anything but gold or silver coin legal tender in payment

¹ Ante, p. 6.

² Rev. St. U. S. § 3412. The above section was superseded by Act Feb. 8, 1875, c. 36, 18 Stat. 311 (U. S. Comp. St. 1901, p. 2249). The tax is not unconstitutional. *Veasie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 205, 272; *Cent. Dig.* § 761.

³ See *Eastman v. Com.*, 4 Gray (Mass.) 416. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 196; *Cent. Dig.* §§ 738-742.

⁴ See *Key v. Knott*, 9 Gill & J. (Md.) 342; *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 196; *Cent. Dig.* §§ 738-742.

⁵ Rev. St. U. S. §§ 5182, 5183 (U. S. Comp. St. 1901, pp. 3481, 3482). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 272; *Cent. Dig.* §§ 738-832.

of debts, no state has power to make bank notes legal tender.⁶ Nor under the National Bank Act are the circulating notes of national banks legal tender, since they are receivable in payment only of taxes and certain other dues to the United States, and for certain debts and demands owing by the United States, and by national banks for debts and liabilities to themselves.⁷ Bank notes are, however, a good tender, unless specifically objected to on the ground that they are not money,⁸ provided they are current at their par value and redeemable upon presentation.⁹

Where, however, a counterfeit note has been received in payment, the creditor may repudiate it and resort to the original debt,¹⁰ provided he returns the note to the debtor without unreasonable delay,¹¹ for, it is said,¹² although the note was of no intrinsic value, it should be returned to the debtor, so as to enable him to trace it out and fall back upon the person from whom he received it. The right to repudiate the payment is the same if the bank had stopped payment, the knowl-

⁶ Article 1, § 10.

⁷ Rev. St. U. S. §§ 5182, 5196 (U. S. Comp. St. 1901, pp. 3481, 3492).

⁸ Hoyt v. Byrnes, 11 Me. 475; Phillips v. Blake, 1 Metc. (Mass.) 156; Cooley v. Weeks, 10 Yerg. (Tenn.) 141. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 196-212, 272; Cent. Dig. §§ 738-832; "*Payment*," Dec. Dig. (Key No.) § 12; Cent. Dig. §§ 42-61.

⁹ Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 196-212, 272; Cent. Dig. §§ 738-832; "*Payment*," Dec. Dig. (Key No.) § 12; Cent. Dig. §§ 42-61.

¹⁰ Young v. Adams, 6 Mass. 182; Ramsdale v. Horton, 3 Pa. 330; Thomas v. Todd, 6 Hill (N. Y.) 340; Hargrave v. Dusenberry, 9 N. C. 326. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 196-212, 272; Cent. Dig. §§ 738-832.

¹¹ Simms v. Clark, 11 Ill. 137; Atwood v. Cornwall, 28 Mich. 336, 15 Am. Rep. 219; Thomas v. Todd, 6 Hill (N. Y.) 340; Raymond v. Baar, 13 Serg. & R. (Pa.) 318, 15 Am. Dec. 603; Pindall's Ex'rs v. Northwestern Bank, 34 Va. 617. See "*Payment*," Dec. Dig. (Key No.) § 12; Cent. Dig. §§ 48, 58.

¹² Thomas v. Todd, 6 Hill (N. Y.) 340. See "*Payment*," Dec. Dig. (Key No.) § 12; Cent. Dig. §§ 48, 58.

edge of the fact not having reached the parties.¹³ In such case, also, the creditor must return the note within a reasonable time.¹⁴ It seems, however, that if payment is made in good faith to a bank of notes purporting to be its own, which are received as such, the bank cannot recover the amount.¹⁵

Bank notes have frequently been made legal tender in payment of debts due to the bank which issued them;¹⁶ but in the absence of a statute to that effect they were not legal tender, even as against the bank.¹⁷ The debtor may, however, avail himself of the notes by way of set-off or counterclaim in an action by the bank upon its demand, provided he acquired the notes before the bank's insolvency.¹⁸

¹³ *Frontier Bank v. Morse*, 22 Me. 88, 38 Am. Dec. 284; *Ontario Bank v. Lightbody*, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179; *Westfall v. Braley*, 10 Ohio St. 188, 75 Am. Dec. 509; *Harley v. Thornton*, 2 Hill (S. C.) 509, note; *Wainwright v. Webster*, 11 Vt. 576, 34 Am. Dec. 707. Contra: *Lowrey v. Murrell*, 2 Port. (Ala.) 280, 27 Am. Dec. 651; *Bayard v. Shunk*, 1 Watts & S. (Pa.) 92, 37 Am. Dec. 441; *Scruggs v. Gass*, 8 Yerg. (Tenn.) 175, 29 Am. Dec. 114. See "*Payment*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* §§ 48, 58.

¹⁴ *Camidge v. Allenby*, 6 B. & C. 373; *Frontier Bank v. Morse*, 22 Me. 88, 38 Am. Dec. 284; *Ontario Bank v. Lightbody*, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179; *Westfall v. Braley*, 10 Ohio St. 188, 75 Am. Dec. 509. See "*Payment*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* §§ 48, 58.

¹⁵ *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. Ed. 334; *Third Nat. Bank v. Allen*, 59 Mo. 310. Cf. *President, etc., of Gloucester Bank v. President, etc., of Salem Bank*, 17 Mass. 33. See 4 Harv. Law Rev. 297, 302. See "*Payment*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* §§ 48, 58.

¹⁶ See *Moise v. Chapman*, 24 Ga. 249; *Railey v. Bacon*, 26 Miss. 455. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 196-212, 272; *Cent. Dig.* §§ 738-832; "*Payment*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* §§ 42-61.

¹⁷ See *Suffolk Bank v. Lincoln Bank*, Fed. Cas. No. 13,590, 3 Mason, 1. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 196-212, 272; *Cent. Dig.* §§ 738-832; "*Payment*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* §§ 42-61.

¹⁸ *American Bank v. Wall*, 56 Me. 167; *President, etc., of Niagara Bank v. Roosevelt*, 9 Cow. (N. Y.) 409; *In re Receiver Middle District*

Rights of Holder in Due Course

Like other negotiable instruments payable to bearer, bank notes are transferable by delivery, with the usual incidents of such negotiation of a negotiable instrument. A purchaser for value without notice from one in possession of a bank note acquires a perfect title, irrespective of the title of the transferor, even though he was a finder of the note or acquired it by theft.¹⁹ The rule is the same, although the note was never issued, and was stolen or otherwise surreptitiously put into circulation.²⁰ It is to be observed that bank notes are not, like other demand paper, deemed to be overdue after a reasonable time, although no demand has been made, but, being intended to circulate indefinitely, are overdue only after demand, so that a purchaser of a bank note is not charged with notice because the note has been long outstanding.²¹

While in a suit upon a negotiable instrument the holder is deemed *prima facie* to be a holder in due course, if it be shown that there was fraud, duress, or illegality in the issue

Bank, 1 Paige (N. Y.) 585, 19 Am. Dec. 452; Haxtun v. Bishop, 3 Wend. (N. Y.) 13; Clarke v. Hawkins, 5 R. I. 219. But see, Eastern Bank v. Capron, 22 Conn. 639; President, etc., of Hallowell & Augusta Bank v. Howard, 13 Mass. 235. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 196-212, 272; *Cent. Dig.* §§ 738-832.

¹⁹ Miller v. Race, 1 Burr. 452; City Bank of Columbus v. Farmers' & Planters' Bank of Baltimore, Fed. Cas. No. 2,738; Sinclair v. Piercy, 5 J. J. Marsh. (Ky.) 63. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 207-210, 272; *Cent. Dig.* §§ 768-812.

²⁰ White v. How, Fed. Cas. No. 17,549, 3 McLean, 291; Olmstead v. Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260; Worcester County Bank v. Dorchester & M. Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120. See, also, Cooke v. United States, 91 U. S. 389, 23 L. Ed. 237 (treasury notes). See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 207-210, 272; *Cent. Dig.* §§ 768-812.

²¹ See Solomons v. Bank of England, 13 East, 135n; Bullard v. Bell, Fed. Cas. No. 2,121, 1 Mason, 243; Ballard v. Inhabitants of Greenbush, 24 Me. 336; Shute v. Pacific Nat. Bank, 136 Mass. 487. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 207-210, 272; *Cent. Dig.* §§ 768-812.

or negotiation of the instrument, the burden is on the holder to prove that he or some person under whom he claims was a holder in due course. In the case of a bank note, however, it has been held that the burden does not shift, but that, notwithstanding it be shown that the note was stolen, it is for the bank to show that the holder did not give value or had notice of defect.²² This exception in the cases of bank notes apparently no longer prevails where the Negotiable Instruments Law has been enacted.²³

Power to Issue

At common law bank notes might be issued by individual bankers, but the right to issue them has very generally been confined to incorporated banks. The power is expressly conferred upon national banks,²⁴ and in practice the issue of bank notes is confined to them.²⁵

The question has sometimes arisen whether bank notes issued by state banks were bills of credit, within the meaning of the federal constitution, prohibiting any state from emitting such bills.²⁶ To be a bill of credit, within the prohibition, it is necessary that the instrument be issued by a state, that it involve the faith of the state, but without the appropriation of any specific fund for its payment and ultimate redemption, and that it be designed to circulate as money on the credit of the state, in the ordinary uses of business.²⁷ Accordingly it has been held that notes issued by a banking corporation estab-

²² *Louisiana Bank v. Bank of United States*, 9 Mart. (O. S. La.) 398; *Pelletier v. State Nat. Bank*, 114 La. 174, 38 South. 132; *Worcester County Bank v. Dorchester & M. Bank*, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; *Wyer v. Dorchester & Milton Bank*, 11 Cush. (Mass.) 51, 59 Am. Dec. 137. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 212; *Cent. Dig.* § 824.

²³ Negotiable Instruments Law, § 59.

²⁴ Rev. St. U. S. § 5136 (U. S. Comp. St. 1901, p. 3455).

²⁵ Ante, p. 257.

²⁶ Const. U. S. art. 1, § 10.

²⁷ *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. Ed. 709; *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903; *Black, Const. L.* 270. See

lished on behalf of the state, which has a paid-up capital and may be sued for its debts, are not bills of credit, even though the state owns the entire stock, and the legislature elects the directors, and the faith of the state is pledged for the redemption of the notes.²⁸

Necessity of Demand—Limitation

Although, as a rule, if paper is payable on demand, and not at a particular place, no presentment is necessary, and an action accrues against the maker from the time of issue, some courts have refused to apply this doctrine to bank notes, which, like certificates of deposit, clearly contemplate presentment at the banking house;²⁹ while other courts have held that if no place of payment is specified a demand is not necessary as a prerequisite to suit.³⁰ Courts which hold that in order to sustain an action upon a bank note there must be a demand of payment have held consistently that the statute of limitations does not begin to run upon the issue of the note, but that it runs from demand and refusal.³¹ On the other

"Banks and Banking," Dec. Dig. (Key No.) §§ 197, 198; Cent. Dig. §§ 743-751.

²⁸ *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. Ed. 709; *Darrington v. Bank of Alabama*, 13 How. 12, 14 L. Ed. 30; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705. See *"Banks and Banking," Dec. Dig. (Key No.) §§ 196-198; Cent. Dig. §§ 738-751.*

²⁹ *Thurston v. Wolfborough Bank*, 18 N. H. 391, 45 Am. Dec. 382; *Crawford v. Bank of Wilmington*, 61 N. C. 136; *F. & M. Bank of Memphis v. White*, 2 Sneed (Tenn.) 482, 64 Am. Dec. 772. See *"Banks and Banking," Dec. Dig. (Key No.) § 212; Cent. Dig. § 817.*

³⁰ *Dougherty v. Western Bank of Georgia*, 13 Ga. 287; *Bryant v. Damariscotta Bank*, 18 Me. 240; *State Bank v. Van Horn*, 4 N. J. Law, 382; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13.

If payable at the bank, demand is required. *Bank of Kentucky v. Hickey*, 14 Ky. 225. See, also, *Bank of Utica v. Magher*, 18 Johns. (N. Y.) 341. See *"Banks and Banking," Dec. Dig. (Key No.) § 212; Cent. Dig. §§ 770, 817.*

³¹ *Thurston v. Wolfborough Bank*, 18 N. H. 391, 45 Am. Dec. 382; *F. & M. Bank of Memphis v. White*, 2 Sneed (Tenn.) 482, 64 Am. Dec. 772 (cf. *State v. President, etc., of Bank of Tennessee*, 5 Baxt.

hand, the courts which hold that demand is not necessary to a cause of action, recognizing that bank notes are intended to circulate indefinitely, have held that the statute of limitations does not apply to bank notes,³² unless the bank has suspended payment and the notes have ceased to circulate as currency.³³ It seems that under the Negotiable Instruments Law no demand is necessary in order to charge the bank, and consequently that the statute of limitations would begin to run from the date of issue.³⁴

Lost or Destroyed Note

Where a negotiable instrument has been lost or destroyed, so that its surrender has become impossible, the holder ordinarily, upon due proof thereof, may recover the amount, upon giving indemnity against subsequent liability thereon, in some jurisdictions in equity, and in others at law. The matter is very generally regulated by statute. In some jurisdictions, a recovery has been permitted upon proof of the destruction of the instrument without indemnity; and recovery in such case, has been permitted upon a destroyed bank note.³⁵ It seems

[Tenn.] 101). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 212; *Cent. Dig.* §§ 816, 817.

³² Dougherty v. Western Bank of Georgia, 13 Ga. 287; Long v. Bank of Yanceyville, 81 N. C. 41. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 212; *Cent. Dig.* §§ 816, 817.

³³ Kimbro v. Bank of Fulton, 49 Ga. 419; Samples v. Bank, Fed. Cas. No. 12,278, 1 Woods, 523. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 212; *Cent. Dig.* §§ 816, 817.

³⁴ Negotiable Instruments Law, § 70; ante, p. 81.

³⁵ Bank of Mobile v. Meagher, 33 Ala. 622; Bank of Louisville v. Summers, 14 B. Mon. (Ky.) 306; Wade v. New Orleans Canal & Banking Co., 8 Rob. (La.) 140, 41 Am. Dec. 296; Hagerstown Bank v. Adams Exp. Co., 45 Pa. 419, 84 Am. Dec. 511; Ross v. Bank of Burlington, 1 Aikens (Vt.) 43, 15 Am. Dec. 664.

On proof of a destruction of its notes a national bank is entitled to receive from the comptroller of the currency blank notes in lieu thereof. Rev. St. U. S. § 5184 (U. S. Comp. St. 1901, p. 3482). Provision is made for the redemption of notes issued to a national bank, which may have been lost or stolen from it and put in circu-

clear, however, that indemnity should be required in all cases, and that the identification of the notes, by number or otherwise, should be so complete that they can be described in the bond, so as to enable the bank, in case they were ever presented by a bona fide holder, to identify them, and to avail itself of the indemnity.³⁶ This would in most cases render a recovery impossible, from the impossibility of identifying the notes. The same considerations apply even more strongly to a lost bank note, and it has been held that in such case the loser must bear the loss and that there can be no recovery from the bank,³⁷ although if a case arose where identification were possible there seems no reason to deny a recovery.³⁸

Where the owner of a bank note has cut it in halves for safety in transmission, it has been held that he may recover upon production of one of the halves and proof of the loss of the other.³⁹ Where the owner had been so cautious, it would be probable that he would also preserve the number of the note, and so would be able to give adequate indemnity.

lation without the signature or on the forged signature of its president and cashier. Act July 28, 1892, c. 317, 27 Stat. 322 (U. S. Comp. St. 1901, p. 3491). See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 208, 212; *Cent. Dig.* §§ 771, 815.

³⁶ *Tower v. President, etc., of Appleton Bank*, 3 Allen (Mass.) 387, 81 Am. Dec. 665. See, also, *Irwin v. Planters' Bank*, 1 Humph. (Tenn.) 145. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 208, 212; *Cent. Dig.* §§ 769-772, 815.

³⁷ *Burridge v. Geauga Bank*, Wright (Ohio) 688. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 208, 212; *Cent. Dig.* §§ 769-772, 815.

³⁸ See *Waters v. Bank of Georgia*, R. M. Charl. (Ga.) 193; *Robinson v. Bank of Darien*, 18 Ga. 65. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 208, 212; *Cent. Dig.* §§ 769-773½, 815.

³⁹ *Bullet v. Bank of Pennsylvania*, Fed. Cas. No. 2,125, 2 Wash. C. C. 172; *Martin v. Bank of the United States*, Fed. Cas. No. 9,156, 4 Wash. C. C. 253; *Armat v. Union Bank of Georgetown*, Fed. Cas. No. 535, 2 Cranch. C. C. 180; *Sill v. Bank of United States*, 5 Conn. 106, 8 Am. Dec. 44; *President, etc., of State Bank of Illinois v. Aresten*, 4 Ill. 135, 36 Am. Dec. 536; *Hinsdale v. Bank of Orange*, 6 Wend. (N. Y.) 378. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 208, 212; *Cent. Dig.* §§ 769-773½, 815.

Security for Circulation

Provision for the protection of the holders of bank notes against the insolvency of the bank have frequently been made, by requiring a certain reserve of cash for the payment of the notes, or by giving the holders a certain preference if the bank becomes insolvent, or by requiring securities to be pledged and deposited with some public officer to secure the payment of the notes. In view of the exclusion of all except national banks from the field of circulation, the law on this subject with reference to state banks need not be considered.

National Bank Notes

Under the National Bank Act, any bank, proposing to issue notes, must secure them by a deposit with the treasurer of the United States of government bonds. Such deposit entitles the bank to receive from the comptroller of the currency notes, which, when received, are in blank, certifying that the security for them is in the hands of the treasurer, and which, when signed by the proper officers of the bank, become its promises to pay upon demand, and which can then be issued for circulation.⁴⁰ The notes are to be paid by the banks when presented,⁴¹ but the law makes provision for their redemption by the treasury at Washington; each bank being required to maintain in the treasury for that purpose a reserve equal to 5 per cent. of its circulation.⁴² While the notes are the obli-

⁴⁰ Rev. St. U. S. §§ 5159, 5160 (U. S. Comp. St. 1901, p. 3469); *Id.* § 5171 (superseded by Act March 14, 1900, c. 41, § 12, 31 Stat. 49 [U. S. Comp. St. 1901, p. 3475]); *Id.* § 5172 (amended by Act May 30, 1908, c. 229, § 11, 35 Stat. 551 [U. S. Comp. St. Supp. 1909, p. 1329]). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 272; *Cent. Dig.* §§ 763-767.

⁴¹ Rev. St. U. S. § 5182 (U. S. Comp. St. 1901, p. 3481).

⁴² Act June 20, 1874, c. 343, § 3, 18 Stat. 123 (U. S. Comp. St. 1901, p. 3488). See, also, Act July 14, 1890, c. 708, § 6, 26 Stat. 289 (U. S. Comp. St. 1901, p. 3490); Act July 28, 1892, c. 317, 27 Stat. 322 (U. S. Comp. St. 1901, p. 3491); Act May 30, 1908, c. 229, § 12, 35 Stat. 552 (U. S. Comp. St. Supp. 1909, p. 1331). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 272; *Cent. Dig.* §§ 738-832.

gations of the banks, they thus carry with them certain engagements binding upon the government; the provision for redemption at the treasury binding the government to pay on demand all notes when presented in due form, and not merely to the extent of the reserve, while in case of the failure of a bank the law provides for the immediate payment of all its notes at the treasury,⁴³ the government thus making itself fully liable in any event for the full amount of the notes.⁴⁴

⁴³ Rev. St. U. S. §§ 5221-5229 (U. S. Comp. St. 1901, pp. 3503-3506).

⁴⁴ See Dunbar, *Theory Hist. Banking*, pp. 137-140.

CHAPTER IX

BANKING CORPORATIONS

68. Incorporation.
69. Place of Transacting Business.
70. Capital Stock.
71. Powers as to Contracts.
72. Buying and Selling Property.
73. Borrowing Money.
74. Guaranty and Suretyship.
75. Ultra Vires Acts and Contracts.
76. Liability of Officers to Bank—At Common Law.
77. Remedies Against Officers.
78. Statutory Liability.

INCORPORATION

68. Subject to constitutional limitations, banking corporations may be created by the state legislatures and by Congress under general or special laws, with the usual incidents of incorporation.

Scope of Chapter

Many questions relating to incorporated banks, state and national, have already been treated, or will be treated later, where they more naturally fall. In this chapter it is proposed to consider briefly certain matters relating to banking corporations which remain. Much of the law relating to such corporations is merely a part of the law relating to corporations generally, and the treatment will be confined to a few matters more particularly relating to corporations with banking powers.

Incorporation

The power of the state legislatures to create corporations, including banking corporations, and to confer powers and privileges upon them within the state, is absolute, except so far

as they may be restricted by the state or federal constitutions.¹ In some states the constitutions require acts creating corporations with banking powers before they shall take effect to be submitted to the people, but these limitations have been held to apply, not to banks of deposit and discount, but only to banks of issue.² Congress has power to incorporate a bank, and may by general law provide for the incorporation of national banks.³ Territorial legislatures, vested by Congress with general legislative powers, have power to create banking corporations.⁴ In the absence of constitutional limitations, corporations may be created under special as well as under general laws; but in most states the legislature is prohibited from creating corporations, with certain reservations, other than under general laws.⁵

A general law authorizing the formation of corporations defines the purpose for which they may be formed, and prescribes the steps necessary to form them. It generally requires, among other steps, articles of incorporation to be filed in some public office, setting forth the certain name of the corporation, the nature of its business and the principal place of transacting it, the period of the corporation's duration, the names and

¹ Clark, Corp. (2d Ed.) 29.

² People ex rel. Badger v. Loewenthal, 93 Ill. 191; Anthony v. International Bank, 93 Ill. 225; Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183; Dearborn v. Northwestern Sav. Bank, 42 Ohio St. 617, 51 Am. Rep. 851; Bates v. People's Savings & Loan Ass'n, 42 Ohio St. 655; State ex rel. Caples v. Hibernian Savings & Loan Ass'n, 8 Or. 396. See, also, Reapers' Bank v. Willard, 24 Ill. 433, 76 Am. Dec. 755; Smith v. Bryan, 34 Ill. 364; Dupee v. Swigert, 127 Ill. 494, 21 N. E. 622.

Sometimes, however, banks of deposit and discount are included. People v. National Sav. Bank (Ill.) 11 N. E. 170. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 25, 26; Cent. Dig. §§ 29-33.

³ Post, p. 361.

⁴ People ex rel. Stickney v. Marshall, 6 Ill. 672; Michigan Bank v. Williams, 5 Wend. (N. Y.) 480. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 25, 26; Cent. Dig. §§ 29-33.

⁵ Clark, Corp. (2d Ed.) 37.

places of residence of the incorporators, the number of the directors and the names and places of those who are to act until an election is held, and the amount of the capital stock and how it is to be paid in, and the like. A compliance with the formalities to be observed as conditions precedent to becoming a corporation is essential to the legal existence; but a substantial compliance is sufficient.⁶ Moreover, a corporation *de facto* may exist notwithstanding noncompliance with conditions precedent; and in such case the existence of the corporation can be questioned only by the state in a direct proceeding brought for that purpose.⁷ Questions of estoppel also arise where persons pretend to form a corporation and assume to exercise corporate powers,⁸ as well as questions as to the personal liability as partners of persons who hold themselves out as a corporation, and contract as such, without having even a *de facto* corporate existence.⁹ The law in respect to the formation of banking corporations and to the other matters above mentioned is part of the law relating to corporations generally, and for its discussion the reader is referred to the books upon corporations and to the statutes of the particular states. An exception will be made, however, in the cases of national banks, both because they are found in all the states and because the distinctive law concerning them lies in narrow compass, admitting of separate treatment.

PLACE OF TRANSACTING BUSINESS

69. Generally the principal operations of a banking corporation must be carried on at the place designated therefor by its charter, although it may through agents in other places perform acts properly incidental to its business. Unless expressly authorized, a banking corporation may not establish a branch bank.

⁶ Clark, Corp. (2d Ed.) 49.

⁷ Clark, Corp. (2d Ed.) 78.

⁸ Clark, Corp. (2d Ed.) 91.

⁹ Clark, Corp. (2d Ed.) 99.

In General

The charter or articles of incorporation usually designate the place—that is, the city or town—where the business is to be transacted or the banking house is to be located. It seems that the effect of this is to confine the bank to that place, and that, unless expressly authorized, it may not establish a banking house or agency elsewhere for the purpose of receiving deposits and conducting a general banking business.¹⁰ It does not follow, however, that it may not through agents in other places enter into contracts and perform acts which are properly incidental to the business as it is ordinarily conducted. A banking corporation, having power to deal in bills of exchange, may buy bills through an agent at a place other than that where it is located within the state,¹¹ or in another state, if permitted by the laws of that state.¹² It may, of course, make collections, keep money on deposit for purposes of exchange, and perform a multitude of other acts through its agents at distant points.

The National Bank Act provides that the organization certificate shall state where the operations of loan and discount are to be carried on, "designating the particular state * * * and the particular county, city, town or village,"¹³ and that

¹⁰ *Bruner v. Citizens' Bank*, 134 Ky. 283, 120 S. W. 345; *People ex rel. Platt v. President, etc., of Oakland County Bank*, 1 Doug. (Mich.) 282. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 33; *Cent. Dig.* §§ 39, 40.

¹¹ *City Bank of Columbus v. Beach*, Fed. Cas. No. 2,736, 1 Blatchf. 425. See *Potter v. Bank of Ithaca*, 7 Hill (N. Y.) 530. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 32; *Cent. Dig.* § 38.

¹² *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 32; *Cent. Dig.* § 38; "*Corporations*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* §§ 143, 144, 2563, 2567.

¹³ Rev. St. U. S. § 5134 (U. S. Comp. St. 1901, p. 3454). See *McCormick v. Market Nat. Bank*, 162 Ill. 100, 44 N. E. 381.

A national bank located in another state is a foreign corporation, and cannot keep an office of discount and deposit in New York, in

"the usual business * * * shall be transacted at the office or banking house located in the place specified in its organization certificate."¹⁴ Under these provisions it has been held that a national bank may not make a contract for cashing checks upon it at any other place than such office or banking house;¹⁵ but it has been held that these provisions do not prevent the purchase of coin by one bank at the office of another. "The provisions," it was said, "must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents."¹⁶

The question of the power or authority of a banking corporation to act or contract elsewhere than at the place where its banking house is established is, of course, to be distinguished from the question in what state it has its legal existence. Although it can perform certain acts elsewhere, a banking corporation, like any other corporation, has no legal existence beyond the state by which it was created, and, so far as it can be a citizen, resident, or inhabitant, is a citizen, resident, or inhabitant only of that state.¹⁷ Questions of jurisdiction over it for purposes of suit in the state and federal courts,¹⁸ and for purposes of taxation,¹⁹ are not here involved.

violation of a statute of that state. *National Bank of Fairhaven v. Phoenix Warehousing Co.*, 6 Hun (N. Y.) 71. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 32; *Cent. Dig.* § 38.

¹⁴ Rev. St. U. S. § 5190 (U. S. Comp. St. 1901, p. 3486).

¹⁵ *Armstrong v. Second Nat. Bank* (D. C.) 38 Fed. 883. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 32, 239; *Cent. Dig.* §§ 38, 893.

¹⁶ *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008. See, also, *Burton v. Burley* (C. C.) 13 Fed. 811, 9 Biss. 253. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 32; *Cent. Dig.* § 38.

¹⁷ *Clark, Corp.* (2d Ed.) 66.

¹⁸ See *Beals, Foreign Corp.* §§ 74-79, 279-284; post, p. 428.

¹⁹ See *Beals, Foreign Corp.* § 462 et seq.; *Clark, Corp.* (2d Ed.) 219.

Branch Banks

The right to establish branch banks is sometimes conferred²⁰ and sometimes withheld;²¹ but in this country banking corporations are usually confined to the exercise of the essential banking functions at the place where by the charter the banking house is to be located. Without express authority a banking corporation has not power to establish a branch bank.²² Under charters and statutes authorizing branches they are usually not distinct corporations,²³ but mere agencies of the parent bank, although sometimes they have had separate corporate existence.²⁴

The National Bank Act authorizes state banks having branches, the capital being joint, to become national banks, and to retain the branches, subject to certain restrictions.²⁵

Foreign Banking Corporations

While a banking corporation may by its agents enter into certain contracts and perform certain acts in a state other than

²⁰ See *State v. Ashley*, 1 Ark. 513; *People ex rel. Stickney v. Marshall*, 6 Ill. 672; *Farmers' Bank v. Garten*, 34 Mo. 119; *State ex rel. Flumerfelt v. Engle*, 50 Wash. 207, 96 Pac. 1045. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 33; *Cent. Dig.* §§ 39, 40.

²¹ See *Bowman v. Cecil Bank*, 3 Grant, Cas. (Pa.) 33. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 33; *Cent. Dig.* §§ 39, 40.

²² *Bruner v. Citizens' Bank of Shelbyville*, 134 Ky. 283, 120 S. W. 345. See, also, *People ex rel. Platt v. President, etc., of Oakland County Bank*, 1 Doug. (Mich.) 282. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 33; *Cent. Dig.* §§ 39, 40.

²³ See *Wallace v. State Bank*, 7 Ark. 61; *Bank of Montreal v. Clark*, 108 Ill. App. 163; *Farmers' Bank of Kentucky v. Calk*, 4 Ky. Law Rep. 617; *Union Bank v. Dunn*, 17 La. 234; *Merchants' Bank of St. Louis v. Farmer*, 43 Mo. 214; *Worth v. Bank of Hanover*, 122 N. C. 397, 29 S. E. 775; *Mason v. Farmers' Bank at Petersburg*, 39 Va. 84. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 33; *Cent. Dig.* §§ 39, 40.

²⁴ See *McNeil v. Wyatt*, 3 Humph. (Tenn.) 125; *Bank of Tennessee v. Burke*, 1 Cold. (Tenn.) 623. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 33; *Cent. Dig.* §§ 39, 40.

²⁵ Rev. St. U. S. § 5155 (U. S. Comp. St. 1901, p. 346).

that by which it was created,²⁶ like any other corporation it can do so only with the consent of the state where it so acts. A state may exclude a foreign corporation altogether, or may impose such terms as it sees fit as a condition of allowing the corporation to do business.²⁷ Some states have passed statutes prohibiting foreign banking corporations from engaging in the banking business. These statutes in terms or by construction apply only to the business of receiving deposits and making discounts, or to keeping an office for that purpose,²⁸ and it is not generally a violation of the statute to engage in an isolated transaction, as to lend money and to take security therefor, or to discount a bill.²⁹ Similarly under statutes requiring foreign corporations to comply with certain conditions before transacting business, it is usually held that a single transaction, as the purchase of a note, does not bring the corporation within the statute.³⁰

²⁶ Ante, p. 270.

²⁷ *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Clark, Corp.* (2d Ed.) 602 et seq.

Banking corporations are not within the act authorizing foreign corporations to transact business in the state. *New York Mortgage Co. v. Secretary of State*, 150 Mich. 197, 114 N. W. 82. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 18; *Cent. Dig.* §§ 23, 24.

²⁸ *Taylor v. Bruen*, 2 Barb. Ch. (N. Y.) 301; *Bowman v. Cecil Bank*, 3 Grant, Cas. (Pa.) 33.

So on ground of public policy. *Bank of Marietta v. Pindall*, 23 Va. 465. See, also, *Bank of Newberry v. Stegall*, 41 Miss. 142. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 18; *Cent. Dig.* §§ 23, 24; "*Corporations*," *Dec. Dig. (Key No.)* § 636; *Cent. Dig.* §§ 2505-2509.

²⁹ See *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Suydam v. Morris Canal & Banking Co.*, cited 5 Hill (N. Y.) 491, note; *Id.*, 6 Hill (N. Y.) 217; *Pickaway County Bank v. Prather*, 12 Ohio St. 497; *Kennedy v. Knight*, 21 Wis. 340, 94 Am. Dec. 543. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 18; *Cent. Dig.* §§ 23, 24.

³⁰ *Commercial Bank v. Sherman*, 28 Or. 573, 43 Pac. 658, 52 Am. St. Rep. 811. Cf. *State v. Aetna Banking & Trust Co.*, 34 Mont. 379, 87 Pac. 268. See *Clark, Corp.* (2d Ed.) 614.

Bringing an action is not doing business. *Citizens' State Bank v.*

CAPITAL STOCK

70. Banking corporations, except savings banks, usually have a capital stock, and membership in the corporation, with its resulting rights and obligations, is determined by ownership of the shares thereof.

The questions arising here are for the most part questions of general corporation law, and do not distinctively concern banking corporations, except so far as the law is affected by particular statutes and charters governing banking corporations, and it would not be possible to treat of them without entering fully into the field of corporations. For the law as a whole relating to the capital stock, including subscription to and issue of the stock,³¹ increase and reduction of the stock,³² the rights incident to membership,³³ the transfer of the stock and the corporation's lien on the shares for debts due from the stockholders,³⁴ the liability of the stockholders for the corporate debts and the enforcement thereof,³⁵ and kindred matters, the reader must consult the books upon corporations and the statutes of the several states.

Cowles, 89 App. Div. 281, 86 N. Y. Supp. 38; *Western Nat. Bank v. Kelly*, 48 Misc. Rep. 366, 95 N. Y. Supp. 574. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 18; *Cent. Dig.* §§ 23, 24; "*Corporations*," *Dec. Dig. (Key No.)* § 642; *Cent. Dig.* §§ 2520-2527.

³¹ See *Clark, Corp.* (2d Ed.) c. 10; post, p. 368.

³² *Clark, Corp.* (2d Ed.) 346; post, pp. 369, 372.

³³ *Clark, Corp.* (2d Ed.) c. 11; post, p. 378.

³⁴ *Clark, Corp.* (2d Ed.) c. 12; post, pp. 375, 377.

³⁵ *Clark, Corp.* (2d Ed.) c. 14; post, p. 381.

POWER AS TO CONTRACTS

71. A banking corporation has no power to enter into any contract that is not expressly or impliedly authorized by its charter. But any contract that is reasonably necessary or proper for carrying out the powers expressly conferred is impliedly authorized.

In General

The principal banking functions of receiving deposits,³⁶ making collections,³⁷ making loans and discounts³⁸ and issuing circulating notes,³⁹ have already been considered. The power to exercise these functions is usually expressly conferred upon banking corporations, although the power to make collections is usually conferred by implication, as being a proper incident of the business of banking. Certain other dealings and contracts remain to be considered. The questions involved for the most part concern the powers of incorporated banks, for private bankers, unless restrained by statute, have the same right as other individuals to enter into such contracts as they may see fit.

Express and Incidental Powers

A banking corporation, like other corporations, has such powers only as are conferred upon it by its charter or by the law of its incorporation; but powers may be conferred by implication as well as expressly. Certain powers, such as the power to contract for authorized purposes, to sue and be sued, to have a common seal, and to make by-laws, are impliedly conferred as incidental to corporate existence.⁴⁰ But, beyond this, corporations have all powers which are reasonably necessary or proper for the execution of the powers expressly granted and which are not expressly or impliedly excluded.⁴¹ Most of the powers to be considered in the present chapter are of this character.

³⁶ Ante, p. 11.

³⁸ Ante, p. 225.

³⁷ Ante, p. 189.

³⁹ Ante, p. 256.

BUYING AND SELLING PROPERTY

72. As a rule, a banking corporation has power to purchase such property as is necessary for its accommodation in the conduct of its business, but not to buy and sell property (other than exchange, coin and bullion, and commercial paper), except in so far as the acquisition and sale is incidental to the taking and enforcement of collateral security and to the payment, settlement, and collection of debts previously contracted.

In General

It is not a function of a bank to buy property for the purpose of selling at a profit. The business of banking in this respect is properly confined to buying and selling exchange, coin and bullion, and negotiable paper.⁴² The acquisition and sale of various kinds of property is, however, a proper incident to the business of banking, when the property is acquired in enforcing and realizing upon collateral security,⁴³ or in settlement or payment of an existing debt and to save itself from loss,⁴⁴ or by levy and sale under a judgment for a debt.⁴⁵

⁴² Under power to buy and sell negotiable paper, a bank may buy and sell bonds. *Mt. Vernon Bank v. Porter*, 52 Mo. App. 244. See, also, *Newport Nat. Bank v. Board of Education of Newport*, 114 Ky. 87, 70 S. W. 186; ante, p. 227. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 86; *Cent. Dig.* § 218.

⁴³ *Bates v. Bank of State*, 2 Ala. 451; *Commercial Bank of Manchester v. Nolan*, 8 Miss. 508; *First Nat. Bank of Parker v. Peavy Elevator Co.*, 10 S. D. 167, 72 N. W. 402; ante, p. 246. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 94-96; *Cent. Dig.* §§ 227-230.

⁴⁴ *Reynolds v. Simpson*, 74 Ga. 454; *Brown v. Hogg*, 14 Ill. 219; *First Nat. Bank of Great Bend v. Bannister*, 7 Kan. App. 787, 54 Pac. 20; *Bank of North America v. Tamblin*, 7 Mo. App. 571; ante, p. 248; post, p. 280. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 94-96; *Cent. Dig.* §§ 227-230.

⁴⁵ *American Nat. Bank v. National Wall Paper Co.*, 77 Fed. 85, 23 C. C. A. 33; *Farmers' & Millers' Bank of Milwaukee v. Detroit & M.*

Exchange, Coin, and Bullion

The buying and selling of exchange—that is, bills of exchange—is properly incidental to the business of banking, and, it seems, is authorized under a general grant of banking powers. The power of buying and selling exchange, coin, and bullion is expressly conferred upon national banks.⁴⁶

Stock in Other Corporations

It is generally held in this country that a corporation has no power to subscribe for or to purchase stock in another corporation, unless such power is expressly granted in its charter or is reasonably implied in it.⁴⁷ This rule applies to banks.⁴⁸ Thus the power to purchase or deal in stock of another corporation is not expressly conferred upon national banks, and it is held that it is not an act which may be exercised as incidental to the powers expressly conferred.⁴⁹ As incidental to the power to loan money, however, national banks, and other banking corporations having like powers,⁵⁰ may accept stock as collateral, and by enforcement of their rights become owner

R. Co., 17 Wis. 372; ante, p. 251; post, p. 280. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 94-96; *Cent. Dig.* §§ 227-230.

⁴⁶ Rev. St. U. S. § 5136 (U. S. Comp. St. 1901, p. 3455).

⁴⁷ Clark, Corp. (2d Ed.) 145.

⁴⁸ Preston v. Marquette County Sav. Bank, 122 Mich. 696, 81 N. W. 920; Bank of Commerce v. Hart, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479; Talmage v. Pell, 7 N. Y. 328; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14. But see Latimer v. Citizens' State Bank, 102 Iowa, 162, 71 N. W. 225 (holding a bank authorized under power to "discount bills, notes, and other securities"). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* § 226; "*Corporations*," *Dec. Dig. (Key No.)* § 377; *Cent. Dig.* §§ 1531-1534.

⁴⁹ California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 260, 261.

⁵⁰ See Deposit Bank of Owensborough v. Barrett (Ky.) 13 S. W. 337. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 92, 260; *Cent. Dig.* § 226.

of the collateral,⁵¹ or may take stock in payment or compromise of doubtful debts, in order to avoid loss and with a view to converting the stock into money.⁵²

While the purchase of stock, not as incidental to the banking business, is ultra vires, so that it would be open to the state to proceed against the bank for violation of its charter, or for stockholders to restrain such violation, it would seem that a purchase is not void.⁵³ Under the extreme doctrine of ultra vires asserted by the Supreme Court of the United States, however, it is held that such a purchase is void, and consequently cannot be ratified, and that the bank, when sued as a stockholder, is not estopped to deny its liability for the debts of such corporation, though it has received dividends on the stock.⁵⁴ Yet it has been held that, while the obligation of an

⁵¹ Ante, p. 248.

⁵² *First Nat. Bank v. National Exchange Bank*, 92 U. S. 122, 23 L. Ed. 679; *Westminster National Bank v. New England Electrical Works*, 73 N. H. 465, 62 Atl. 971, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637; *Tourtlot v. Whithed*, 9 N. D. 407, 84 N. W. 8. See, also, *California Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198.

It is ultra vires to take stock in a corporation engaged in the speculative business of buying and selling the shares of an insolvent corporation, with power, but without obligation, to engage, as an independent enterprise, in a manufacturing business, though the shares be taken in exchange for a claim against the corporation. *First Nat. Bank v. Converse*, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 92, 260; *Cent. Dig.* § 226.

⁵³ See *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85; *Id.*, 95 Minn. 206, 103 N. W. 1032. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 92, 260; *Cent. Dig.* § 226.

⁵⁴ *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; *Shaw v. National German-American Bank*, 132 Fed. 658, 65 C. C. A. 620; affirmed 199 U. S. 603, 26 Sup. Ct. 750, 50 L. Ed. 328; *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206. See, also, *Schofield v. Goodrich Bros. Banking Co.*, 98 Fed. 271, 39 C. C. A. 76.

A national bank is without power to purchase, as an investment, with its surplus funds, and to hold, shares of another national bank,

ultra vires contract, whether executed or executory, is void, the fact that the purchase of stock was ultra vires does not prevent the bank from getting title to the stock.⁵⁵

Bank's Own Stock

Some state banks are prohibited from purchasing their own stock,⁵⁶ while others are not so prohibited.⁵⁷ In the absence of restriction, a bank may take its own stock for a past debt,⁵⁸ and this power is sometimes expressly conferred.⁵⁹ A national bank is prohibited from becoming a purchaser or holder of the shares of its own capital stock, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.⁶⁰ An unauthorized purchase however, is not void, and its illegality can be attacked only by the government.⁶¹

and though it has received dividends on such shares, it is not estopped to plead the unlawfulness as a defense in an action by the receiver of the second bank to collect an assessment thereon by the comptroller. *First Nat. Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 101, 261; *Cent. Dig.* §§ 237, 238.

⁵⁵ *Metropolitan Trust Co. v. McKinnon*, 172 Fed. 846, 97 C. C. A. 194. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 101, 261; *Cent. Dig.* §§ 237, 238.

⁵⁶ See *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60.

As to the power of corporations in general, see *Clark, Corp.* (2d Ed.) 148. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* § 225.

⁵⁷ See *Kassler v. Kyle*, 28 Colo. 374, 65 Pac. 34; *Robison v. Beall*, 26 Ga. 17; *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 18 Vt. 131. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* § 225.

⁵⁸ *Draper v. Blackwell*, 138 Ala. 182, 35 South. 110; *Taylor v. Miami Exporting Co.*, 6 Ohio 177. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* § 225.

⁵⁹ *St. Paul & M. Trust Co. v. Jenks*, 57 Minn. 248, 59 N. W. 299. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* § 225.

⁶⁰ *Ante*, p. 249.

⁶¹ *Lantry v. Wallace*, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218 (holding a subsequent sale by the bank lawful, and the buyer liable as a shareholder); *Wallace v. Hood* (C. C.) 89 Fed. 11; *Id.*, 97 Fed.

Real Estate

Unless expressly authorized a banking corporation has no power to purchase real estate to sell again.⁶² Power to purchase enough for a banking house is often expressly conferred, and would doubtless be implied,⁶³ and incidentally to this power a bank may erect a building larger than necessary for its requirements and lease space in it to others.⁶⁴ It may buy and hold real estate under any mortgage that it is authorized to take,⁶⁵ and under sale and levy upon execution,⁶⁶ and may take real estate in settlement or payment of a claim or debt, or to secure or save a debt.⁶⁷ It may, of course, sell land so acquired.⁶⁸ Even if a bank purchase land for an unauthorized

983, 38 C. C. A. 692, affirmed 182 U. S. 555, 21 Sup. Ct. 885, 45 L. Ed. 1227. See, also, *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *First Nat. Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 101; *Cent. Dig.* §§ 237, 238.

⁶² *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Thweatt v. Bank of Hopkinsville*, 81 Ky. 1; *Bank of Michigan, President, etc., of v. Niles*, 1 Doug. (Mich.) 401, 41 Am. Dec. 575. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 95; *Cent. Dig.* §§ 228, 229.

⁶³ *Clark, Corp.* (2d Ed.) 119.

⁶⁴ *Banks v. Poitiaux*, 24 Va. 136, 15 Am. Dec. 706; post, note 281. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 95; *Cent. Dig.* §§ 228, 229.

⁶⁵ Ante, p. 250.

⁶⁶ See *Martin v. Branch Bank of Decatur*, 15 Ala. 587, 50 Am. Dec. 147; *Sherry v. Denn ex dem. State Bank of Indiana*, 8 Blackf. (Ind.) 542; *Merchants' Bank of St. Louis v. Harrison*, 39 Mo. 433, 93 Am. Dec. 285. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 95; *Cent. Dig.* §§ 228, 229.

⁶⁷ *Brown v. Bradford*, 103 Iowa, 378, 72 N. W. 648; *State Security Bank v. Hoskins*, 130 Iowa, 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376; *Thomaston Bank v. Stimpson*, 21 Me. 195; *Missouri State Bank v. South St. Louis Foundry*, 145 Mo. App. 257, 129 S. W. 433. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 95; *Cent. Dig.* §§ 228, 229.

⁶⁸ *Jackson v. Brown*, 5 Wend. (N. Y.) 590; *Talman v. Rochester City Bank*, 18 Barb. (N. Y.) 123 (with covenants of warranty). See

purpose, however, it is generally held that it acquires and can convey good title; the question as to the legality of the transaction being solely between the bank and the state.⁶⁹

By the terms of the National Bank Act,⁷⁰ a national bank may purchase, hold, and convey real estate for certain purposes, viz.: (1) Such as shall be necessary for its immediate accommodation in the transaction of its business; ⁷¹ (2) such as shall be mortgaged to it in good faith by way of security for debts previously contracted; ⁷² (3) such as shall be conveyed to it in satisfaction of debts previously contracted in the course of

"Banks and Banking," Dec. Dig. (Key No.) § 95; Cent. Dig. §§ 228, 229.

⁶⁹ *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6; ante, p. 251. See *"Banks and Banking," Dec. Dig. (Key No.) § 95; Cent. Dig. §§ 228, 229.*

⁷⁰ Rev. St. U. S. § 5137 (U. S. Comp. St. 1901, p. 3460).

⁷¹ This power includes the power to lease, and a bank does not exceed its powers by leasing ground for 99 years under an agreement with the owner that he will erect a building for its use. The bank may improve the land as any other prudent owner would do, and is not limited to a building only sufficient for its own use. *Brown v. Schleier*, 118 Fed. 981, 55 C. C. A. 475, affirmed 194 U. S. 18, 24 Sup. Ct. 558, 48 L. Ed. 857. Cf. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817. See, also, *Weeks v. International Trust Co.*, 125 Fed. 370, 60 C. C. A. 236.

It may enlarge its building for better accommodation of its business, and at the same time provide offices to be rented. *Wingert v. First Nat. Bank of Hagerstown, Md.*, 175 Fed. 739, 99 C. C. A. 315.

It may make a contract to prevent the erection of buildings on adjacent land so as to secure light and air. *First Presbyterian Church v. National State Bank*, 57 N. J. Law, 27, 29 Atl. 320; *Id.*, 58 N. J. Law, 406, 36 Atl. 1129. See *"Banks and Banking," Dec. Dig. (Key No.) § 259; Cent. Dig. §§ 980-982.*

⁷² *Cockrell v. Abeles*, 86 Fed. 505, 30 C. C. A. 223; *Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402.

Holding a second mortgage, it may buy in a first to protect its interest. *Holmes v. Boyd*, 90 Ind. 332.

A bank, which has taken a deed of trust to secure a previous loan, and bought the land on foreclosure, may cut and sell the timber thereon. *Roebeling v. First Nat. Bank (D. C.)* 30 Fed. 744. See

its dealings;⁷³ and (4) such as it shall purchase under judgments, decrees, or mortgages held by it, or shall purchase to secure debts due to it.⁷⁴ The act also provides that banks may purchase, hold and convey only for the purposes named, and that no bank shall hold possession of any real estate under mortgages, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years. As we have seen, however, an objection to the taking of a mortgage not authorized under the above provisions can be urged only by the government.⁷⁵ Neither can an objection to the title to real estate purchased by a bank, although for an unauthorized purpose, be urged by any one except the government.⁷⁶

BORROWING MONEY

73. Unless expressly restricted or limited, a banking corporation has power to borrow money, whenever in the conduct of its business it is necessary or expedient to do so, and to execute notes and other evidences of indebtedness therefor.

"Banks and Banking," Dec. Dig. (Key No.) § 259; Cent. Dig. §§ 980-982.

⁷³ *Turner v. First Nat. Bank of Madison*, 78 Ind. 19.

It may pay the excess in value over the debt. *Libby v. Union Nat. Bank*, 99 Ill. 622. See *"Banks and Banking," Dec. Dig. (Key No.) § 259; Cent. Dig. §§ 980-982.*

⁷⁴ *Mapes v. Scott*, 88 Ill. 352; *Upton v. National Bank of South Reading*, 120 Mass. 153; *Wherry v. Hale*, 77 Mo. 20. See *"Banks and Banking," Dec. Dig. (Key No.) § 259; Cent. Dig. §§ 980-982.*

⁷⁵ *Ante*, p. 251.

⁷⁶ *Reynolds v. First Nat. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; *Kerfoot v. Farmers' & M. Bank*, 218 U. S. 281, 31 Sup. Ct. 14, 54 L. Ed. 1042; *Brown v. Schleier*, 118 Fed. 981, 55 C. C. A. 475; *Mapes v. Scott*, 94 Ill. 379; *De Witt County Nat. Bank v. Mickelberry*, 244 Ill. 77, 91 N. E. 86, 135 Am. St. Rep. 304; *Wherry v. Hale*, 77 Mo. 20; *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418, 46 S. W. 1000. See *"Banks and Banking," Dec. Dig. (Key No.) §§ 95, 259; Cent. Dig. §§ 228, 229, 980-982.*

Except so far as there may be express restrictions in the charter,⁷⁷ a corporation has power to borrow money whenever the nature of its business renders it proper or expedient.⁷⁸ It follows that a banking corporation with general powers may borrow money,⁷⁹ and that it may give its bonds, notes, or other evidences of debt therefor.⁸⁰ Thus the power to borrow money is not expressly given by the national banking act, but the power is recognized as incidentally conferred.⁸¹

National banks are prohibited from being at any time indebted or in any way liable to an amount exceeding the amount of their capital stock paid in and remaining undiminished, except on notes of circulation, deposits and collections, bills of exchange and drafts drawn against money actually on deposit to their credit, and liabilities to stockholders for dividends and

⁷⁷ See *Commonwealth v. Bank of Mutual Redemption*, 4 Allen (Mass.) 1. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 97; *Cent. Dig.* § 231; "*Corporations*," *Dec. Dig. (Key No.)* § 460; *Cent. Dig.* § 1813.

⁷⁸ *Clark, Corp.* (2d Ed.) 136.

⁷⁹ *Ward v. Johnson*, 95 Ill. 215; *Tuttle v. National Bank of Republic*, 48 Ill. App. 481; *Harris v. Randolph County Bank*, 157 Ind. 120, 60 N. E. 1025; *Deposit Bank of Carlisle v. Fleming* (Ky.) 44 S. W. 961; *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165; *Ringling v. Kohn*, 6 Mo. App. 333; *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 134; *Barnes v. Ontario Bank*, 19 N. Y. 152. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 97; *Cent. Dig.* § 231.

⁸⁰ *Curtis v. Leavitt*, 17 Barb. (N. Y.) 309; *Id.*, 15 N. Y. 9. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 97; *Cent. Dig.* § 231.

⁸¹ *Auten v. United States Nat. Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920. See, also, *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611; *Hanover Nat. Bank v. First Nat. Bank of Burlingame, Kan.*, 109 Fed. 421, 48 C. C. A. 482.

Notes given by a bank, when embarrassed by pressing demands, in part consideration of the assumption by the payee of all its outstanding obligations, secured by a pledge of all its assets remaining after turning over cash and such bills receivable as the payee would accept at par, are its valid obligations, enforceable against its stockholders after voluntary liquidation. *Wyman v. Wallace*, 201 U. S.

reserved profits.⁸² Notwithstanding this prohibition, an indebtedness incurred by a national bank in the exercise of any of its authorized powers, and for which it has received and retains the consideration, is not void because the indebtedness surpasses the prescribed limit.⁸³

GUARANTY AND SURETYSHIP

74. Unless expressly authorized, a banking corporation has not power to enter into a contract of guaranty or suretyship, except when such contract is for its own advantage, as an incident to a contract or transaction which is within its express or implied powers. It has no power to make accommodation paper.

Guaranty

In the absence of an express grant of authority, a banking corporation, as a rule, has not the power to become the guarantor or surety of the obligation of another person, or to lend its credit to any person.⁸⁴ No such power being con-

230, 26 Sup. Ct. 495, 50 L. Ed. 738. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 97, 258; Cent. Dig. § 231.

⁸² Rev. St. U. S. § 5202 (U. S. Comp. St. 1901, p. 3494).

⁸³ Weber v. Spokane Nat. Bank, 64 Fed. 208, 12 C. C. A. 93. See, also, Brown v. Schleier (C. C.) 112 Fed. 577; Id., 118 Fed. 981, 55 C. C. A. 475; affirmed 194 U. S. 18, 24 Sup. Ct. 558, 48 L. Ed. 857; Stephens v. Monongahela Bank, 88 Pa. 157, 32 Am. Rep. 438. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 101, 261; Cent. Dig. §§ 237, 238, 991-1000.

⁸⁴ Seligman v. Charlottesville Nat. Bank, Fed. Cas. No. 12,642, 3 Hughes, 647; Commercial Nat. Bank v. Pirie, 82 Fed. 799, 27 C. C. A. 171; Bowen v. Needles Nat. Bank, 94 Fed. 925, 36 C. C. A. 553; Merchants' Nat. Bank v. Baird, 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526; Barron v. McKinnon (C. C.) 179 Fed. 759; Thilmany v. Iowa Paper Bag Co., 108 Iowa, 333, 79 N. W. 68; Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334; Ayer v. Hughes, 87 S. C. 382, 69 S. E. 657. See "*Banks and Banking*," Dec. Dig. (Key No.) § 99; Cent. Dig. § 236.

ferred by the National Bank Act, this rule applies to national banks.⁸⁵ Thus a banking corporation has no implied power to become an accommodation party to negotiable paper,⁸⁶ to execute a bond or undertaking for another in a judicial proceeding,⁸⁷ or to guarantee that a draft drawn by a third person on a customer will be paid.⁸⁸ A different case is presented where a bank enters into guaranty for its own advantage as an incident to business in which it is authorized to engage.⁸⁹ Thus a bank may incur the ordinary obligation of an indorser incident to the transfer of negotiable paper,⁹⁰ and it may expressly guarantee such paper properly issued or transferred by it.⁹¹ So, in conveying real estate, it may enter into the usual covenants of warranty.⁹²

⁸⁵ See cases cited in preceding note.

⁸⁶ *National Bank v. Atkinson* (C. C.) 55 Fed. 465; *Bacon v. Farmers' Bank*, 79 Mo. App. 406; *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23; *Morford v. Farmers' Bank of Saratoga County*, 26 Barb. (N. Y.) 568. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* § 236.

⁸⁷ *Bailey v. Farmers' Nat. Bank*, 97 Ill. App. 66; *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville*, 62 Neb. 472, 87 N. W. 156; *Id.*, 69 Neb. 220, 95 N. W. 819. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 96, 99, 258; *Cent. Dig.* § 236.

⁸⁸ *National Bank of Brunswick v. Sixth Nat. Bank*, 212 Pa. 238, 61 Atl. 889. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 99, 260; *Cent. Dig.* §§ 236, 984.

⁸⁹ *Central R. & Banking Co. of Georgia v. Farmers' Loan & Trust Co.*, 114 Fed. 263, 52 C. C. A. 149; *Talman v. Rochester City Bank*, 18 Barb. (N. Y.) 123; *Dabney v. Bank of State*, 3 S. C. 124. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* § 236.

⁹⁰ *United States Nat. Bank v. First Nat. Bank*, 79 Fed. 296, 24 C. C. A. 597. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 99, 109, 260; *Cent. Dig.* §§ 236, 984.

⁹¹ *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. Ed. 907; *Cochran v. United States*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704; *Thomas v. City Nat. Bank of Hastings*, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263. See, also, *Appleton v. Citizens' Cent. Nat. Bank of New York*, 190 N. Y. 417, 83 N. E. 470, 32 L. R. A. (N. S.) 543. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* § 236.

⁹² See *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642, 90 C.

It is very generally held, and, this being the doctrine of the Supreme Court of the United States, the rule applies to national banks, that an ultra vires contract of guaranty is void, and that the bank in an action thereon may plead this fact in defense, although the other party has acted upon the faith of the guaranty.⁹³ If, however, the bank has received money or property under the contract, it is held, even where the stricter rule prevails, that the bank may be compelled to refund what it has received, not in an action upon the unlawful contract, but in an action quasi ex contractu.⁹⁴ And if the contract is such that it might under certain circumstances properly be entered into, in the absence of evidence to the contrary, the presumption will prevail that it was lawfully entered into.⁹⁵ A holder can, of course, charge a bank as an accommodation party to a negotiable instrument, if he is a holder in due course and without notice of the accommodation character of the bank's signature.⁹⁶

C. A. 338, 17 L. R. A. (N. S.) 526. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 96, 99; Cent. Dig. §§ 230-236.

⁹³ Bowen v. Needles Nat. Bank, 94 Fed. 925, 36 C. C. A. 553; Merchants' Bank of Valdosta v. Baird, 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526; First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059. Contra: Seeber v. Commercial Nat. Bank (C. C.) 77 Fed. 957; Hutchins v. Planters' Nat. Bank, 128 N. C. 72, 38 S. E. 252. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 101, 260, 261; Cent. Dig. §§ 237, 238, 991-1000.

⁹⁴ Citizens' Cent. Nat. Bank of New York v. Appleton, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443; Appleton v. Citizens' Cent. Nat. Bank of New York, 190 N. Y. 417, 83 N. E. 470, 32 L. R. A. (N. S.) 543; Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334. See "*Banks and Banking*," Dec. Dig. (Key No.) § 101; Cent. Dig. §§ 237, 238.

⁹⁵ Mine & Smelter Supply Co. v. Stockgrowers' Bank, 173 Fed. 859, 98 C. C. A. 229. Cf. Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville, 62 Neb. 472, 87 N. W. 156; Id., 69 Neb. 220, 95 N. W. 819. See "*Banks and Banking*," Dec. Dig. (Key No.) § 99; Cent. Dig. § 236.

⁹⁶ In re Troy & Cohoes Shirt Co. (D. C.) 136 Fed. 420. See, also, Bowen v. Needles Nat. Bank, 94 Fed. 925, 36 C. C. A. 553; Clark,

Other Contracts

In general, it may be said that a banking corporation has power to enter into any contract for its own advantage which is incidental to the business in which it is authorized to engage.⁹⁷ Thus, a national bank, having power to receive deposits, may give a bond to secure them.⁹⁸ It is not always easy to draw the line between what is and what is not within the implied powers. It has been held that a national bank may engage in the business of dealing in and exchanging national bonds,⁹⁹ but that it may not deal as a broker in buying and selling securities.¹⁰⁰ It has been held, however, that the lending of money on deposit for a customer, unless pro-

Corp. (2d Ed.) 174. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 99, 260; *Cent. Dig.* §§ 236, 984.

⁹⁷ *McCraith v. National Mohawk Val. Bank*, 104 N. Y. 414, 10 N. E. 862. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* § 230.

⁹⁸ *Interstate Nat. Bank v. Ferguson*, 48 Kan. 732, 30 Pac. 237; *State v. First Nat. Bank (C. C.)* 88 Fed. 947. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 96, 99; *Cent. Dig.* §§ 230-236.

⁹⁹ *Leach v. Hale*, 31 Iowa, 69, 7 Am. Rep. 112. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 258, 260; *Cent. Dig.* §§ 977-990.

¹⁰⁰ *Farmers' & Merchants' Nat. Bank v. Smith*, 77 Fed. 129, 23 C. A. 80; *Weckler v. First Nat. Bank of Hagerstown*, 42 Md. 581, 20 Am. Rep. 95; *First Nat. Bank of Allentown v. Hock*, 89 Pa. 324, 33 Am. Rep. 769. See, also, *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107.

It has not power to loan the money of other persons. *Grow v. Cockrill*, 63 Ark. 418, 39 S. W. 60, 36 L. R. A. 89.

An agreement to procure a person applications for insurance if he would procure for it a customer is ultra vires. *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567.

A national bank, which itself purchased notes it had been authorized by the owner to sell to a third party, and which thus became under general principles of law liable for their value as for a conversion, is not protected from such liability by the National Bank Act, though it was not within its powers to act as agent for sale of the notes. *First Nat. Bank v. Anderson*, 172 U. S. 573, 19 Sup. Ct. 284, 43 L. Ed. 558. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 258, 260; *Cent. Dig.* §§ 277-290.

hibited, is within the powers of a state bank.¹⁰¹ A bank, state¹⁰² or national,¹⁰³ has no power to enter into a partnership. And ordinarily an incorporated bank is without power to devote money gratuitously to manufacturing corporations, exhibitions, and the like.¹⁰⁴

¹⁰¹ Bobb v. Savings Bank (Ky.) 64 S. W. 494. See, also, New Hope & D. Bridge Co. v. Phenix Bank, 3 N. Y. 156.

The bank must use ordinary care. Watson v. Roth, 191 Ill. 382, 61 N. E. 65; Wykoff v. Irvine, 6 Minn. 496 (Gil. 344), 80 Am. Dec. 461; Larson v. Utah Loan & Trust Co., 23 Utah, 449, 65 Pac. 208. Even if it acts gratuitously. Watson v. Fagner, 208 Ill. 136, 70 N. E. 23; Clinton Nat. Bank v. National Park Bank of New York, 37 App. Div. 601, 56 N. Y. Supp. 244. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 96, 195; Cent. Dig. § 728.

¹⁰² Interstate Trust & Banking Co. v. Reynolds, 127 La. 193, 53 South. 520. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 101, 261; Cent. Dig. §§ 237, 238, 991-1000.

¹⁰³ A national bank may not become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, and sell a leasehold, and such want of authority is a defense to an action against it upon liability for the partnership debts. Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 26 Sup. Ct. 613, 50 L. Ed. 1036.

A national bank, having joined in a partnership, cannot be prevented from recovering moneys loaned to the firm on the ground that it had no power to become a partner. Cameron v. First Nat. Bank of Decatur (Tex. Civ. App.) 34 S. W. 178. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 101, 261; Cent. Dig. §§ 237, 238, 992.

¹⁰⁴ McCoy v. World's Columbian Exhibition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288; McCrory v. Chambers, 48 Ill. App. 445; Robertson v. Buffalo County Nat. Bank, 40 Neb. 235, 58 N. W. 715; Arkansas Valley & W. Ry. Co. v. Farmers' & Merchants' Bank, 21 Okl. 322, 96 Pac. 765, 129 Am. St. Rep. 782 (subscription to secure construction of railroad). See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 96-98; Cent. Dig. §§ 230-235.

ULTRA VIRES ACTS AND CONTRACTS

75. An act is said to be ultra vires when it is beyond the powers expressly or impliedly conferred upon a corporation. When a corporation performs an ultra vires act, the state may maintain proceedings against it to forfeit its charter for misuser, and this is usually the only penalty when a banking corporation takes an unauthorized conveyance, the conveyance vesting title in the bank. On the question whether, and under what circumstances, an action will lie on an ultra vires contract, the authorities are in conflict, and there is much confusion in the cases. Some courts hold that an unauthorized contract is void, as being beyond the powers conferred, and that, as a rule, no action can be maintained upon it; while other courts hold that the plea of ultra vires should not prevail, whether interposed for or against the corporation, when it would be inequitable and unjust to allow it, as where the party seeking to enforce the contract has performed it on his or its part, and the other has received the benefit of performance. All courts agree that

(1) If the contract has been fully executed on both sides, the courts will not interfere at the instance of either party to undo what has been done.

(2) If the contract is executory on both sides, neither party can maintain an action upon it.

(3) When the contract is one within the general power of the corporation, but is unauthorized only under the particular circumstances of which the party seeking to enforce it had not notice, an action thereon can be maintained by such party against the corporation.

(4) When either party has received benefits un-

der the contract, such party may be compelled to refund what he or it has received.

(5) Where a charter prohibits a contract or transaction, but does not declare it void, and the purpose of the charter does not indicate an intention to make it void, it is generally held that the objection that it was prohibited can be raised only by the state in a direct proceeding against the corporation to forfeit its charter.

Ultra Vires

An act is said to be ultra vires when it is beyond the corporate powers, meaning by "power" authority or right to act. When a corporation has thus exceeded its powers, the state may maintain proceedings against it to forfeit its charter for misuser; and when an ultra vires act is threatened, a stockholder may maintain a bill in equity to enjoin its performance, and a stockholder may enjoin the performance of an ultra vires contract.¹⁰⁵ But it does not follow that the act of a corporation is of no effect because it is ultra vires. For example, an ultra vires purchase of real estate by a banking corporation is not void, but vests title in it.¹⁰⁶

Upon the question whether, and under what circumstances, an action will lie on an ultra vires contract, the authorities are in conflict.¹⁰⁷ If an ultra vires contract has been fully executed on both sides, the rule prevails everywhere that neither party can maintain an action at law or a suit in equity to recover what he or it has parted with.¹⁰⁸ And if an ultra vires contract is wholly executory on both sides, all courts substantially agree that no action can be maintained to enforce it, either to recover damages for its breach, or for specific per-

¹⁰⁵ Clark, Corp. (2d Ed.) pp. 161-164.

¹⁰⁶ Ante, p. 282.

¹⁰⁷ Clark, Corp. (2d Ed.) 167.

¹⁰⁸ Clark, Corp. (2d Ed.) 171.

formance.¹⁰⁹ Many courts hold, however, that if a contract is objectionable only because it is ultra vires, in an action upon it the plea of ultra vires will not prevail, whether interposed for or against the corporation, when it would be inequitable and unjust to allow it, as where the party seeking to enforce performance has performed on his part and the other has received the benefit of such performance. This is clearly the better doctrine, and is supported by the great weight of authority.¹¹⁰ Some courts, on the other hand, including the Supreme Court of the United States, hold that an ultra vires contract is void, as being beyond the powers conferred upon the corporation, and that, as a rule, no action can be maintained upon it.¹¹¹ "A contract by a corporation which is ultra vires in the proper sense," said Mr. Justice Gray, speaking for

¹⁰⁹ *Holt v. Winfield Bank* (C. C.) 25 Fed. 812; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; *Bank of Michigan, President, etc., of, v. Niles*, Walk. Ch. (Mich.) 99; *Id.*, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14; *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 101; *Cent. Dig.* §§ 228, 237, 238.

¹¹⁰ *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85; *Id.*, 95 Minn. 206, 103 N. W. 1032; *Tootle v. First Nat. Bank*, 6 Wash. 181, 33 Pac. 345; *Security Nat. Bank v. St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 101, 261; *Cent. Dig.* §§ 237, 238, 991-1000.

See, also, although opposed to the doctrine of the federal courts, *American Nat. Bank v. National Wall Paper Co.*, 77 Fed. 85, 23 C. C. A. 33; *Seeber v. Commercial Nat. Bank* (C. C.) 77 Fed. 957. See, generally, *Clark, Corp.* (2d Ed.) 178 et seq. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 101; *Cent. Dig.* §§ 228, 237, 238; "*Specific Performance*," *Dec. Dig. (Key No.)* § 36; *Cent. Dig.* § 107.

¹¹¹ *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007; *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65; *Metropolitan Stock Exchange v. Lyndonville Nat. Bank*, 76 Vt.

the Supreme Court of the United States,¹¹² "that is to say, outside the object of the creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

Even in those jurisdictions where the courts hold ultra vires contracts void, an exception to the rule is made where the party dealing with the corporation did not know, and is not chargeable with knowledge, of the ultra vires nature of the contract. Every person dealing with a corporation is charged with notice of the limitations of its powers; but if the contract was one which was within the general powers of the corporation, although unauthorized under the facts and circumstances or for the particular purpose, of which the other party had not notice, an action may be maintained by him upon the con-

303, 57 Atl. 101. See, generally, Clark, Corp. (2d Ed.) 168. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 101, 261; Cent. Dig. §§ 237, 238, 991-1000.

¹¹² Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. See "*Banks and Banking*," Dec. Dig.

tract.¹¹³ Thus a banking corporation having general power to make and indorse negotiable paper is liable thereon to a holder in due course, although it was made or indorsed for an unauthorized purpose, as for accommodation, or in payment of property which it had not authority to purchase.¹¹⁴

Again, even in those jurisdictions where the courts hold ultra vires contracts void, if either party has received benefits under such a contract, such party may be compelled to refund or to give compensation therefor, not in an action upon the contract, but in an action quasi ex contractu.¹¹⁵ "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money

(*Key No.*) §§ 101, 261; *Cent. Dig.* §§ 237, 238; "*Corporations*," *Dec. Dig.* (*Key No.*) § 388; *Cent. Dig.* §§ 1556-1567.

¹¹³ *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Clark, Corp.* (2d Ed.) 173. See "*Banks and Banking*," *Dec. Dig.* (*Key No.*) §§ 101, 261; *Cent. Dig.* §§ 237, 238, 991-1000.

¹¹⁴ *Sioux Falls Nat. Bank v. First Nat. Bank of Sioux Falls*, 6 Dak. 113, 50 N. W. 829; *Jacobs' Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171; *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *National Park Bank v. German-American Mutual Warehouse & Security Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; *Marshall Nat. Bank v. O'Neal*, 11 Tex. Civ. App. 640, 34 S. W. 344. See "*Banks and Banking*," *Dec. Dig.* (*Key No.*) §§ 101, 261; *Cent. Dig.* §§ 237, 238, 991-1000.

¹¹⁵ *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *Emmerling v. First Nat. Bank*, 97 Fed. 739, 38 C. C. A. 399; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354. See "*Banks and Banking*," *Dec. Dig.* (*Key No.*) §§ 101, 261; *Cent. Dig.* §§ 237, 238, 991-1000.

which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."¹¹⁶

Effect of Prohibition in Charter

If the charter of a bank, instead of merely not authorizing a certain contract, expressly prohibits it, the contract may stand upon a different footing from one that is merely ultra vires. Often such contracts are held to be illegal and void, so that no action can be maintained upon them. Thus where a bank had taken a deposit upon time, in violation of a statute prohibiting contracts by banks for the payment of money at a future day certain, it was held that the agreement because expressly prohibited was illegal and void, and that no action could be maintained against the bank upon the contract.¹¹⁷ Yet if the charter or statute, while prohibiting certain contracts, does not declare them void, and the purpose of the statute does not show an intention on the part of the legislature to make them void, it is generally held that an objection that they were prohibited can be raised only by the state in a direct proceeding against the bank to forfeit its charter.¹¹⁸ And even when the contract is held to be illegal, because prohibited, if the prohibition was intended for the protection of the party asking the relief, he will not be regarded as in pari delicto, and he may disaffirm the contract and recover what he has parted with. This has frequently been held in cases where

¹¹⁶ Pullman Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 101, 261; Cent. Dig. §§ 237, 238, 991-1000; "*Corporations*," Dec. Dig. (Key No.) § 385; Cent. Dig. §§ 1545-1547.

¹¹⁷ White v. President, etc., of Franklin Bank, 22 Pick. (Mass.) 181. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 101, 261; Cent. Dig. §§ 237, 238, 991-1000; "*Corporations*," Dec. Dig. (Key No.) § 487; Cent. Dig. §§ 1893-1898.

¹¹⁸ Union National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank of Genesee v. Whitney, 103 U. S. 99, 26 L. Ed. 443. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 101, 261; Cent. Dig. §§ 237, 238, 991-1000; "*Corporations*," Dec. Dig. (Key No.) § 387; Cent. Dig. §§ 1548-1553.

banks have been prohibited from issuing notes, bills, or other securities, the parties who receive the prohibited securities being permitted to recover the money paid for them.¹¹⁹

A full discussion of the doctrine of ultra vires is beyond the scope of this book. In the cases involving ultra vires acts and contracts by incorporated banks, both views have necessarily prevailed, according to the doctrines prevailing in the different jurisdictions, and illustrations of this divergence of opinion will frequently appear.

National Banks

It is important to bear in mind that the strict view of the doctrine of ultra vires, which is asserted by the Supreme Court of the United States, governs the contracts of national banks. At the same time, while that rule has sometimes been applied in cases arising under the National Bank Act,¹²⁰ it cannot be said to have been consistently applied, and the tendency of the court has been to hold that contracts and transactions unauthorized by the act, and even prohibited, are not void, but that, where no other penalty is imposed, the legislative intention contemplated as the only penalty for a violation of the act a direct proceeding by the government for the forfeiture of the bank's charter.¹²¹ Such has been the con-

¹¹⁹ See *White v. President, etc., of Franklin Bank*, 22 Pick. (Mass.) 181; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 101; *Cent. Dig.* §§ 237, 238; "*Corporations*," *Dec. Dig. (Key No.)* § 487; *Cent. Dig.* §§ 1893-1898.

¹²⁰ *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; ante, p. 285. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 261; *Cent. Dig.* §§ 991-1000.

¹²¹ "It has been held repeatedly by this court that where the provisions of the National Banking Act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties." *Thompson v. Saint Nicholas Nat. Bank*, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 261; *Cent. Dig.* §§ 991-1000.

struction placed upon the provisions of the act limiting the liability of any person to the bank for money borrowed,¹²² limiting the bank's own indebtedness,¹²³ prohibiting the bank from making any loan or discount on the security of or being a purchaser or holder of its own stock,¹²⁴ prohibiting the bank from taking real estate mortgages, except by way of security for debts previously contracted, and from purchasing, holding, and conveying real estate except for certain purposes.¹²⁵

LIABILITY OF OFFICERS TO BANK

76. AT COMMON LAW—The directors and other officers of a banking corporation are liable to it, at common law, for losses sustained:

(1) By reason of a willful abuse of the confidence reposed in them, as by exceeding their authority or the powers of the corporation, or by misapplication of the corporate funds.

(2) By reason of negligence and inattention to their duties. Directors are bound to exercise the same diligence and care which ordinarily prudent and diligent men would exercise under similar circumstances.

77. REMEDIES AGAINST OFFICERS—Where a loss results to the corporation by the fraud, wrong, or negligence of its directors or other officers, the corporation may maintain an action at law to recover damages, or, in a proper case, a suit in equity to compel them to account. An individual stockholder cannot as a rule maintain an action, but he may sue when the directors will not

¹²² Ante, p. 228.

¹²³ Ante, p. 283.

¹²⁴ Ante, p. 249.

¹²⁵ Ante, p. 251.

institute suit, and relief cannot be obtained by applying to a stockholders' meeting. Creditors of the corporation, in case of its insolvency, may enforce the liability to the corporation.

78. STATUTORY LIABILITY—In many jurisdictions, by statute, the directors and other officers who are guilty of certain acts of official misconduct are made liable to creditors, and for certain acts are liable criminally.

Officers and Agents

As with other corporations, a majority of the stockholders of a banking corporation can regulate and control the exercise of its powers, and has power by a vote duly taken to bind the minority within the powers of the corporation. The acts of a majority, to be binding on the corporation, must be done at a meeting of the stockholders duly held and conducted, at which each shareholder has a vote, usually one vote for each share. Usually the power to make by-laws regulating the conduct and defining the duties of the members and officers is expressly conferred, but it will otherwise be implied; the power being primarily in the stockholders, although they or the charter may authorize the directors to make them. Generally the charter provides what officers and agents shall manage the affairs of the corporation. Usually the management is vested in a board of directors or trustees, who are elected periodically by the stockholders, and the directors appoint other officers and agents. The charter may or may not provide what qualifications are necessary for directors and other officers. When the general management is intrusted to a board of directors or other officers, they have in general, when acting as a board, the power to bind the corporation by any act or contract within the powers conferred upon it.

These are all matters of general corporation law, except so far as they involve the terms and construction of particu-

lar charters, and a consideration of them, except so far as concerns national banks, is beyond the scope of this book.¹²⁶

Liability of Officers to the Bank

In general, as with other corporations, the directors or other officers of a banking corporation, if they act in good faith, within the limits of the corporate powers and within their authority, and use proper prudence and diligence, are not responsible for losses resulting to the corporation from mere mistakes or errors in judgment,¹²⁷ or for losses from accident, theft, and the like, where they have not been negligent.¹²⁸

On the other hand, the directors or other officers who willfully abuse their trust, or misapply the funds of the corporation, by which loss is sustained, are personally liable to make good the loss.¹²⁹ They are bound to observe the limits

¹²⁶ See Clark, Corp. (2d Ed.) pp. 430-479.

¹²⁷ Wheeler v. Aiken County Loan & S. Bank (C. C.) 75 Fed. 781; Witters v. Sowles (C. C.) 31 Fed. 1; Jones v. Johnson, 86 Ky. 530, 6 S. W. 582; Cope v. Westbay, 188 Mo. 638, 87 S. W. 504; Second Nat. Bank of Oswego v. Burt, 93 N. Y. 233. See "*Banks and Banking*," Dec. Dig. (Key No.) § 54; Cent. Dig. §§ 92-107.

¹²⁸ Batchelor v. Planters' Nat. Bank of Louisville, 78 Ky. 435; Savings Bank of Louisville's Assignees v. Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488. See "*Banks and Banking*," Dec. Dig. (Key No.) § 54; Cent. Dig. §§ 92-107.

¹²⁹ Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402; Oakland Bank of Savings v. Wilcox, 60 Cal. 126 (paying overdraft of one without means); San Joaquin Val. Bank v. Bours, 65 Cal. 247, 3 Pac. 864; First Nat. Bank of Ft. Scott v. Drake, 29 Kan. 311, 44 Am. Rep. 646; Pendleton v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 171; First Nat. Bank of Sturgis v. Reed, 36 Mich. 263; Austin v. Daniels, 4 Denio (N. Y.) 299, 47 Am. Dec. 252; Bank of St. Mary's v. Calder, 3 Strobl. (S. C.) 403 (cashier paying overdraft without excuse); Brown v. Farmers' & Merchants' Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359 (loan to infant); First Nat. Bank of Brandon v. Briggs' Estate, 70 Vt. 599, 41 Atl. 586. Cf. McIlroy Banking Co. v. Dickson, 66 Ark. 327, 50 S. W. 868. See, also, Farmers' & Traders' Bank v. Kimball Milling Co., 1 S. D. 388, 47 N. W. 402, 36 Am. St. Rep. 739 (following trust funds fraudulently diverted by officers).

Where directors of a national bank engaged in or knowingly per-

placed upon their powers by the charter and the by-laws, and the rules of the bank, and, if they intentionally or negligently exceed those powers, they are liable for the loss.¹³⁰ And they are equally liable if they suffer the corporate funds to be wasted by negligence or inattention to their duties, although they do not act in bad faith. Thus a cashier or other officer who is charged with the duty of making loans and discounts, and the like, is liable for losses which result from his failure to exercise the care and discretion which an ordinarily prudent man would exercise in his own affairs.¹³¹

mitted stock speculation by the president and vice president with the bank's funds, such directors were liable for the losses sustained. *McKinnon v. Morse* (C. C.) 177 Fed. 576. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 92-107.

¹³⁰ *Western Bank of Louisville, Ky., v. Coldemey's Ex'x*, 120 Ky. 776, 83 S. W. 629; *Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402.

Where a national bank acquired certain mill property in satisfaction of a debt, and the directors organized a corporation among themselves for the purpose of operating the mills as the bank's agent, using its funds, and operated them for the bank at a loss of \$23,000, the directors of the bank participating are liable to the creditors for the loss. *Cockrill v. Abeles*, 86 Fed. 505, 30 C. C. A. 223.

A cashier, required by the by-laws to consult other officers, or committees, in making discounts, is not responsible by reason of failure so to do, where the committees hold no meetings and the officers systematically absent themselves. *Second Nat. Bank of Oswego v. Burt*, 93 N. Y. 233. See, also, *Wynn v. Tallapoosa County Bank*, 158 Ala. 469, 53 South. 228. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 92-107.

¹³¹ *Phryse v. Farmers' Bank of Beattyville (Ky.)* 33 S. W. 532; *First Nat. Bank v. Reese (Ky.)* 76 S. W. 384; *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712; *Id.*, 127 Mich. 407, 86 N. W. 1015.

The purchase of a note by the president and managing officer of a bank, for which he paid from its funds over \$20,000, with knowledge that it was burdened with a guaranty made by the payee, which might defeat its collection, is such negligence as renders him liable to account to the bank or its creditors for any

As a rule one officer is not responsible for the negligence or defaults of another,¹³² although he is, of course, responsible if he assists or connives therein;¹³³ and a superior officer may be liable for the acts of a subordinate, if he fails to exercise reasonable diligence in supervision.¹³⁴

Directors stand upon a somewhat different footing from the executive officers charged with the duties of transacting the business of the bank and actively managing its affairs. It is their duty to use proper care in the selection of the executive officers, and to exercise a general supervision over the bank's affairs.¹³⁵ "They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in

loss which resulted. *Stearns v. Lawrence*, 83 Fed. 738, 28 C. C. A. 66; *Id.* (C. C.) 79 Fed. 738. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 54; *Cent. Dig.* §§ 92-107.

¹³² *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712; *Davenport v. Prentice*, 126 App. Div. 451, 110 N. Y. Supp. 1056.

A by-law of a bank, making the cashier responsible "for all the moneys, funds, and valuable of the bank," in force when defendant was elected cashier, became a part of his contract and made him liable for losses resulting from mistakes or malfeasance of the assistant cashier, liable under another by-law for money coming into his possession. *Rio State Bank v. Amondson*, 141 Wis. 82, 123 N. W. 634. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 54; *Cent. Dig.* §§ 92-107.

¹³³ *Hobart v. Dovell*, 38 N. J. Eq. 553; *Latimer v. Veader*, 20 App. Div. 418, 46 N. Y. Supp. 823. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 54; *Cent. Dig.* §§ 92-107.

¹³⁴ See *Batchelor v. Planters' Nat. Bank of Louisville*, 78 Ky. 435; *Grant County Deposit Bank v. Points* (Ky.) 56 S. W. 662. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 54; *Cent. Dig.* §§ 92-107.

¹³⁵ *Post*, p. 310.

the appointment of agents.”¹³⁶ “Bank directors are often styled ‘trustees’; but they are not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract, and not of trust.”¹³⁷ They “are not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentleman of character and responsibility would be found willing to occupy such places.”¹³⁸

The extent of the supervision and the degree of watchfulness which they are required to exercise is a question on which the courts have differed, at least in their expressions. Some courts declare that the directors are bound to manage the affairs of the corporation with the same degree of care and prudence which is generally exercised by business men in their own affairs.¹³⁹ Most courts declare, however, that the degree of care required is only such as an ordinarily prudent and diligent man would exercise under similar circumstances.¹⁴⁰

¹³⁶ *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. See, also, *Warner v. Penoyer*, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761; *Clews v. Bardon* (C. C.) 36 Fed. 617; *Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408; *Mason v. Moore*, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 92-107.

¹³⁷ *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. Cf. *Holmes v. McDonald*, 226 Ill. 169, 80 N. E. 714. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 92-107.

¹³⁸ *Spering's Appeal*, 71 Pa. 11, 10 Am. Rep. 684. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 92-107.

¹³⁹ See *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Warren v. Robison*, 19 Utah, 289, 57 Pac. 287, 75 Am. St. Rep. 734; *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; *Elliott v. Farmers' Bank*, 61 W. Va. 641, 57 S. E. 242. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 92-107.

¹⁴⁰ *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76; *Swentzel v. Penn*

In a leading case involving the responsibility of directors in national banks—and it seems that the same standard applies to directors of other banks—it was said: “In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is therefore ultimately a question of fact, to be determined under all the circumstances.” It appearing that the affairs of the bank were managed by its president, who had the reputation of being trustworthy and efficient, and who owned a greater part of the stock, and that the bank was generally considered to be in a prosperous condition, it was held that directors could not be held liable for losses through mismanagement on the ground of negligence, in that they did not, within 90 days after they became directors, compel the board to make a thorough investigation of the books and condition of the bank. “We are of opinion,” said the court, “that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an investigation, and did not themselves individually conduct an examination during their short period of service, or because they did not happen to go among the clerks and look through the books, or call for or run over the bills receivable. Of course, a thorough examination would have ascertained that the bank ought to be put into liquidation at once.” ¹⁴¹

Bank, 147 Pa. 140, 23 Atl. 405, 415, 15 L. R. A. 305, 30 Am. St. Rep. 718. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 92–207.

¹⁴¹ *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. See, also, *Gibbons v. Anderson* (C. C.) 80 Fed. 345; *Rankin v. Cooper* (C. C.) 149 Fed. 1010. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 92–107.

The directors of a bank may properly intrust to the cashier the discretionary powers which appertain to the immediate management of the business, including the discounting of paper, and they are not responsible for his malversations unless their own proper care would have prevented the loss; nor are they required to take unusual precaution when they have no reason to distrust the integrity and efficiency of the cashier and other employes; but directors who are especially charged with the duty of examining the bank's condition and securities are responsible for losses which result from their failure to perform such duty with reasonable care and diligence.¹⁴²

¹⁴² The cashier of a national bank permitted an outside corporation, in which he was interested, to become indebted to the bank, through overdrafts and notes of its members, discounted to the amount of \$72,000, which was the chief cause of the bank's failure. The directors had an examining committee and a committee on discounts, whose duty it was to examine the bank's condition and securities periodically. In fact, the committees made no independent examination, but merely checked the notes by a list furnished by the cashier. One of such lists, which was approved some months before the failure, showed eight notes for \$5,000 each; but, although the capital of the bank was but \$50,000, the members of the committee to whom the list was furnished had no recollection of having seen such notes, nor did they know of the large indebtedness of the corporation. Held, that the members of the committees were guilty of negligence which rendered them liable for the losses resulting from the mismanagement of the cashier, but that the other directors were not liable; it not appearing that they had knowledge of the negligent manner in which the committees, on whose reports they relied, had performed their duties. *Warner v. Penoyer*, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761.

Directors of a national bank left its management for more than three years almost wholly to its cashier, who had but little property, and of whom they required no bond; and they knowingly permitted loans to be made to individuals and firms largely in excess of the amounts allowed by law. They also failed to record mortgages given to secure large debts due the bank, even after they were aware of its insolvency, and erroneously advised an examiner, who had taken charge of the bank, that it was not neces-

Remedies Against Officers

As in the case of other corporations, where a loss results to a banking corporation by reason of the fraud, wrong, or negligence of its directors or other officers, the corporation may maintain an action at law to recover damages or a suit in equity to compel an accounting. The suit should ordinarily be brought by the corporation, for the injury is to it, and not to the individual stockholders. The directors or other officers are not the agents of the stockholders, but of the corporation, and therefore at law the corporation alone can sue. But where the directors cannot or will not institute suit in the name of the corporation, and relief cannot be had by applying to a stockholders' meeting, a stockholder may maintain a suit in equity for the benefit of the corporation. These are matters of general corporation law, and are not peculiar to banking corporations.¹⁴³

Liability to Creditors

The creditors of an insolvent corporation, in order to procure satisfaction of their claims, may enforce the liability of directors and other officers of the corporation for losses resulting from their negligence and dishonesty in the management of the corporate affairs. The right of action in such cases is sometimes based upon the ground that the assets of the corporation are a trust fund for the benefit of the creditors and that the officers are trustees for their benefit. The trust fund doctrine has been virtually exploded by the decisions of the courts of the highest authority, and properly speaking no trust relation exists between the officers and the creditors of a corporation.¹⁴⁴ The true basis of the right of the creditors

sary to record them. Held, that the directors were personally liable for the losses caused by such neglect and mismanagement and the fraud and defalcations of the cashier. *Robinson v. Hall*, 63 Fed. 222, 12 C. C. A. 674. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 54; *Cent. Dig.* §§ 92-107.

¹⁴³ See *Clark, Corp.* (2d Ed.) 506; post, p. 400.

¹⁴⁴ *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed.

to proceed against the officers is the right to reach equitable assets of the corporation and to apply them to the satisfaction of their claims. The officers being liable to the corporation for losses caused by their fraud, gross negligence, or willful breach of duty, this liability may be enforced by or for the benefit of the creditors when the corporation becomes insolvent. The above considerations apply to depositors, as well as other creditors, of a bank; the directors, as agents of the corporation, being liable only to it for their breach of duty,¹⁴⁵ and liable to the depositors only indirectly through the corporation when it becomes insolvent. That the officers are thus liable to creditors, when by reason of their negligence or dishonesty in the performance of their duties the bank has been subjected to loss, and in consequence the assets of the bank are insufficient to pay its debts, is well established.¹⁴⁶

It follows that the remedy of the creditor is not by action at law against the guilty officers,¹⁴⁷ although there are cases

662; ante, p. 301. See *Clark, Corp.* (2d Ed.) 526, 594. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 57; *Cent. Dig.* §§ 108-110.

¹⁴⁵ Ante, p. 304.

¹⁴⁶ *Foster v. Bank of Abington* (C. C.) 88 Fed. 604; *Trustees of Mutual Building Fund & Dollar Savings Bank v. Bossieux* (D. C.) 3 Fed. 817; *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120; *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; *Gores v. Day*, 99 Wis. 276, 74 N. W. 787. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 57; *Cent. Dig.* §§ 108-110.

¹⁴⁷ *Union Nat. Bank v. Hill*, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; *Hart v. Hanson*, 14 N. D. 570, 105 Wis. 942, 3 L. R. A. (N. S.) 438. See, also, *Killen v. State Bank*, 106 Wis. 546, 82 N. W. 536.

Cases of receiving deposits with knowledge of the bank's insolvency are to be distinguished. This is a fraud, and a director or other officer who takes part therein is liable directly to the depositors for losses suffered thereby. *Cassidy v. Uhlmann*, 170 N. Y. 505, 63 N. E. 554. See, also, *Delano v. Case*, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81. Cf. *Baxter v. Coughlin*, 70 Minn. 1, 72 N.

to the contrary.¹⁴⁸ The remedy is by bill in equity, in which the corporation itself should be made a party, in order to protect the directors from being called to account a second time, and in which all the creditors should be made parties, or the bill be filed on behalf of the complainant and all others standing in the same situation, so as to enable them to come in under the decree.¹⁴⁹ Unlike a stockholder, a creditor, before he can maintain a suit to assert rights properly enforceable by the corporation itself, is not required first to seek to procure action by the corporation.¹⁵⁰ Of course, where the corporation is in the hands of a receiver or assignee, as the representative of all concerned, he is the proper party to maintain an action.¹⁵¹ But, if he declines to sue, the suit may be maintained by the creditors.¹⁵²

Statutory Liability

In many states it is provided by statute that the directors or other officers of banking corporations shall be liable for its debts, when they are guilty of certain acts of official miscon-

W. 797. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 57; *Cent. Dig.* §§ 108-110.

¹⁴⁸ Solomon v. Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Tate v. Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 58; *Cent. Dig.* § 111.

¹⁴⁹ Chester v. Halliard, 36 N. J. Eq. 313; Cunningham v. Pell, 5 Paige (N. Y.) 607. See, also, Marshall v. Farmers' & Merchants' Sav. Bank of Alexander, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84. Cf. Deaderick v. Bank of Commerce, 100 Tenn. 457, 45 S. W. 786. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 58; *Cent. Dig.* § 116.

¹⁵⁰ Foster v. Bank of Abingdon (C. C.) 88 Fed. 604. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 58, 154.

¹⁵¹ Stone v. Rottman, 183 Mo. 552, 82 S. W. 76; Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120; Warner v. McMullin, 131 Pa. 370, 18 Atl. 1056. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 54, 58; *Cent. Dig.* §§ 111-120.

¹⁵² Gores v. Murphy, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* §§ 99-104.

duct; ¹⁵³ while certain other acts on their part are denounced as crimes. A consideration of the statutory liability of bank officers, civil or criminal, is beyond the scope of this book. The provisions of the National Bank Act imposing such liabilities upon national banks will be considered.¹⁵⁴

¹⁵³ See Clark, Corp. (2d Ed.) 597.

¹⁵⁴ Post. p. 398.

CHAPTER X

REPRESENTATION OF BANK BY OFFICERS

- 79. In General.
- 80. Directors.
- 81. President.
- 82. Cashier.
- 83. Tellers and Subordinate Officers.
- 84. Admissions and Representations.
- 85. Notice—In General.
- 86. Disclosure Against Interest.

IN GENERAL

- 79. A bank, whether incorporated or unincorporated, is bound by the acts and contracts of its officers, under the rules of agency applicable to other persons and corporations.**

Banks, whether incorporated or unincorporated, necessarily act through agents, and certain of these agents by usage are invested with more or less well-defined powers. The matters to be considered in this chapter relate largely to the law of agency. Most of these matters, indeed, relate especially to the representation of banking corporations by their officers; but the powers of the officers of a corporation over its business and property are strictly powers of agents—powers, either conferred by charter, or delegated to them by the directors, in whom, as representatives of the corporation, the control of its business and property is vested. Like agents of natural persons, they can bind their principal, the corporation, only within the scope of their authority, actual or apparent, except where the corporation may be estopped to deny that the agent so acted.¹

¹ Clark, Corp. (2d Ed.) 480.

DIRECTORS

80. The general management of a banking corporation is ordinarily by the charter intrusted to a board of directors, which has the power to bind the bank by any act or contract within the powers conferred upon the corporation. The board may ordinarily appoint the other officers and agents of the bank and define their duties, and may delegate an authority, not involving the exercise of a discretion vested in it, to one of their own number, or to a third person, to do acts for the bank.

In General

Usually the management of a banking corporation is vested in a board of directors, elected by the stockholders, and the directors appoint other officers and agents. Generally the directors are required to be stockholders, and sometimes the directors, or some of them, are required to be residents of the state.² When the directors are given the management and control of the corporation, and there are no express limitations on their powers, they may make any contracts and perform any acts which may be necessary or proper to enable the corporation to accomplish the purposes of its creation.³ Thus, they may borrow money when necessary,⁴ pledge the bank's faith in the execution of their trust,⁵ assign over its securities,⁶

² Post, p. 397.

³ Clark, Corp. (2d Ed.) 471.

⁴ Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; Leavitt v. Yates, 4 Edw. Ch. (N. Y.) 134; ante, p. 282. See "*Banks and Banking*," Dec. Dig. (Key No.) § 102; Cent. Dig. § 240.

⁵ State v. Bank of Louisiana, 5 Mart. N. S. (La.) 327.

They may not pledge future earnings without authority of stockholders. Brown v. Bradford, 103 Iowa, 378, 72 N. W. 648. See "*Banks and Banking*," Dec. Dig. (Key No.) § 105; Cent. Dig. §§ 249-252.

⁶ Stevens v. Hill, 29 Me. 133; President, etc., of Northampton Bank v. Pepoon, 11 Mass. 288; Cross v. Rowe, 22 N. H. 77. See

release or compromise a claim or an action,⁷ and even authorize an assignment of the bank's property for the benefit of creditors, when in failing circumstances.⁸

On the other hand, the directors can lawfully do no act that is not within the powers conferred upon the corporation, and if they attempt to do so, and relief cannot be obtained through the corporation, a stockholder may maintain a suit to enjoin them.⁹ Unauthorized acts, however, if within the powers of the corporation, may be ratified by the stockholders.¹⁰ Acts not within the powers of the corporation may not be binding upon it, because they are *ultra vires*, or may be a ground for forfeiture of the charter.¹¹

Appointment of Agents

The board of directors, having the general superintendence and management of the affairs of the corporation, constitute the corporation for all purposes of dealing with others on its behalf.¹² Not only have they ordinarily express authority to

"Banks and Banking," Dec. Dig. (Key No.) § 109; Cent. Dig. §§ 257-260.

⁷ *Wolf v. Bureau*, 1 Mart. N. S. (La.) 162; *Frankfort Bank v. Johnson*, 24 Me. 490; *Baird v. Bank of Washington*, 11 Serg. & R. (Pa.) 411; *Olney v. Chadsey*, 7 R. I. 224.

They cannot release an original subscriber to the stock, nor make any arrangement whereby the bank, its creditors, or the state shall lose any of the benefit of his subscription. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203. See *"Banks and Banking," Dec. Dig. (Key No.) § 110; Cent. Dig. §§ 265-268.*

⁸ *National Bank of Commerce v. Shumway*, 49 Kan. 224, 30 Pac. 411; *Merrick v. Trustees of Bank of Metropolis*, 8 Gill (Md.) 59; *Town v. President, etc., of Bank of River Raisin*, 2 Doug. (Mich.) 530; *Dana v. Bank of United States*, 5 Watts & S. (Pa.) 223. Cf. *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592. See *"Banks and Banking," Dec. Dig. (Key No.) § 104; Cent. Dig. §§ 246-248.*

⁹ Ante, p. 290.

¹⁰ *Clark, Corp.* (2d Ed.) 473.

¹¹ Ante, p. 289.

¹² *Percy v. Millaudon*, 3 La. 568; *Burrill v. President, etc., of Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395. See *"Banks and Banking," Dec. Dig. (Key No.) § 102; Cent. Dig. §§ 239-243.*

appoint the other officers and agents of the bank and to define their duties, but a board of directors may delegate an authority to a committee, or to one of their number, or to some other officer or person, to do acts for the corporation, unless the acts can by the charter be done only by themselves.¹³ Thus, they may authorize one of their number, or some officer, to assign over securities,¹⁴ or to borrow money.¹⁵

The cashier, and to some extent the other officers, have more or less well-defined powers, and, like other agents, they may bind their principal within the scope of their customary or apparent authority. The directors may, of course, define the duties of the officers, and thereby expressly confer upon them authority larger than that customarily incident to their offices. And the directors may also, by permitting an officer to exercise powers other than those customarily incident to his office, or other than the powers expressly conferred, impliedly authorize him to exercise such other powers.¹⁶ An officer may have power, however, to bind the bank, although he exceeds the customary authority of his office, and the authority actually conferred upon him; for if the directors have, by acquiescing in or shutting their eyes to the general course of dealing in the bank, permitted the officer to hold himself out as having certain powers, his acts within such general course of dealing will be binding on the bank. "Directors cannot, in justice to

¹³ *Stamford Bank v. Benedict*, 15 Conn. 437; *Wallace v. Exchange Bank of Spencer*, 126 Ind. 265, 26 N. E. 175; *Waxahachi Nat. Bank v. Vickery* (Tex. Civ. App.) 26 S. W. 876; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555. See "*Banks and Banking*," *Dec. Dig. Key No.* §§ 102-112; *Cent. Dig.* §§ 239-272.

¹⁴ *Stevens v. Hill*, 29 Me. 133; *Merrick v. Trustees of Bank of Metropolis*, 8 Gill (Md.) 59; *President, etc., of Northampton Bank v. Pepoon*, 11 Mass. 288. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 246.

¹⁵ *Ridgway v. Farmers' Bank of Bucks County*, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 250.

¹⁶ *Post*, p. 315.

those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."¹⁷

Must Act as a Board

The government and management of the corporate affairs is vested in the directors as a board, and not otherwise.¹⁸ The separate action of one or all of the directors individually is not the action of the body clothed with the corporate powers, and does not bind the corporation.¹⁹

Ratification

The board may, of course, ratify and render valid an act done without previous authority, if they could have authorized it; and they may do so impliedly, as well as expressly, as by recognizing the act as binding, and acting upon it.²⁰

¹⁷ *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; post, p. 316. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 113, 114; *Cent. Dig.* §§ 273-280.

¹⁸ *Louisiana State Bank v. Senecal*, 13 La. 525. Cf. *National Bank of Commerce v. Shumway*, 49 Kan. 224, 30 Pac. 411. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 102; *Cent. Dig.* § 240.

¹⁹ *First Nat. Bank v. Drake*, 35 Kan. 564, 11 Pac. 445, 57 Am. Rep. 193; *Clark, Corp.* (2d Ed.) 475; post, p. 337. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 102; *Cent. Dig.* § 240.

²⁰ *American Exch. Nat. Bank v. First Nat. Bank*, 82 Fed. 961, 27 C. C. A. 274; *Roe v. Bank of Versailles*, 167 Mo. 406, 67 S. W. 303; *Wyckoff, Church & Partridge v. Riverside Bank*, 135 App. Div. 400, 119 N. Y. Supp. 937; *Winton v. Little*, 94 Pa. 64. See, also, *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. Ed. 907;

PRESIDENT

81. The authority of the president, other than such as he may have as a director when he is a member of the board, has been declared to be limited to taking charge of the litigation of the bank; but greater authority is commonly conferred upon him, either expressly or by implication, and more recently some courts have declared that he has authority to indorse negotiable paper in the ordinary course of the bank's business and to perform other acts customarily performed by the cashier, such as drawing drafts and checks, certifying checks, and issuing certificates of deposit.

The president is usually a director, and as such has the authority of a member of the board. As president, his inherent authority is small. Greater authority than belongs to him merely *ex officio* may be conferred upon the president by the charter, or by the directors, either expressly²¹ or by implication.²² It is said that the only function falling within

Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; *Eastern Townships Bank v. Vermont Nat. Bank* (C. C.) 22 Fed. 186; *Blanchard v. Commercial Bank*, 75 Fed. 249, 21 C. C. A. 319; *Clark, Corp.* (2d Ed.) 486. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* §§ 277-280.

²¹ *First Nat. Bank v. National Park Bank of New York* (C. C.) 175 Fed. 881; *Boyd's Ex'r v. First Nat. Bank of Williamsburg*, 128 Ky. 468, 108 S. W. 360; *Ex parte Rickey*, 31 Nev. 82, 100 Pac. 134, 135 Am. St. Rep. 651; *Cake v. Pottsville Bank*, 116 Pa. 264, 9 Atl. 302, 2 Am. St. Rep. 600; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 102; *Cent. Dig.* § 242.

²² *Armstrong v. Chemical Nat. Bank*, 83 Fed. 556, 27 C. C. A. 601; *Reno v. James*, 16 Ky. Law Rep. 60; *Neiffer v. Bank of Knoxville*, 1 Head (Tenn.) 162.

Authority may be conferred by a general usage. *Armstrong v.*

his inherent power is to take charge of the litigation of the bank.²³ He may employ counsel, and appear for the bank.²⁴ It has also been said that the decisions for the most part are decisions to the effect that the president had no right by virtue of his office to perform some particular act.²⁵ Thus it has been held that the president, as such, has not authority to sell the property of the bank,²⁶ to execute a mortgage on its real estate,²⁷ to borrow money,²⁸ to waive conditions of a contract for the sale of land,²⁹ or to release a claim.³⁰

Chemical Nat. Bank, 83 Fed. 556, 27 C. C. A. 601. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 102; *Cent. Dig.* § 242.

²³ Morse, Banks & B. (4th Ed.) § 143.

²⁴ Russell v. Washington Savings Bank, 23 App. D. C. 398; Citizens' Nat. Bank of Kingman v. Berry, 53 Kan. 696, 37 Pac. 131, 24 L. R. A. 719; Savings Bank of Cincinnati v. Benton, 2 Metc. (Ky.) 240; Merchants' Nat. Bank v. Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227. But see, Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634.

He has authority by virtue of his office to make a valid assignment of a judgment in favor of the bank. Guernsey v. Black Diamond Coal & Mining Co., 99 Iowa, 471, 68 N. W. 777. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 110; *Cent. Dig.* § 267.

²⁵ Morse, Banks & B. (4th Ed.) § 143.

²⁶ Asher v. Sutton, 31 Kan. 286, 1 Pac. 535; Greenawalt v. Wilson, 52 Kan. 109, 34 Pac. 403; First Nat. Bank v. Lucas, 21 Neb. 280, 31 N. W. 805; Smith v. Lawson, 18 W. Va. 212, 41 Am. Rep. 688 (to indorse or transfer notes). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 247.

²⁷ Leggett v. New Jersey Mfg. & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 247.

²⁸ Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 102; *Cent. Dig.* § 242.

²⁹ Chadbourne v. Stockton Savings & Loan Soc., 101 Cal. xvii, 36 Pac. 127. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 247.

³⁰ E. Swindell & Co. v. Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13. Wheat v. Bank of Louisville (Ky.) 5 S. W. 305; State Savings Loan & Trust Co. v. Stewart, 65 Ill. App. 391; Olney v. Chadsey, 7 R. I. 224; Hodge's Ex'r v. First Nat. Bank, 63 Va. 51. See,

Whatever are the inherent powers of the president, he frequently exercises very broad powers with the consent of the directors, and when they permit him to exercise certain powers his authority to exercise them will be implied.³¹ "It is unnecessary to attempt any general definition of the duties of the respective officers of banking corporations," it was said in a recent case. "The usage is not uniform in different cities, and sometimes not the same in different institutions in the same city. Country banks, and banks in small towns and cities, have different rules from those in large cities. Of course, there are certain general rules as to the duties of the cashier, teller, president, or directors. Courts have oftentimes recognized the fact, and have frequently decided, that these officers have or have not either exclusive or concurrent powers to do certain acts of the nature designated in the particular case. Customs have sprung up from the necessity and the convenience of business in certain localities, and have prevailed in duration and extent until they have acquired in such localities the force of law. In the present case it is the exceptional class with which we have to deal. It is now well settled by the weight of reason and authority that whenever, in the usual course of the business of the corporation, the president or other officer has been allowed to manage and control its affairs, his authority to represent and bind the corporation may be implied from the manner in which he has been permitted by the trustees or directors of the corporation to transact its business. The acting head of the corporation, whether it

also, *Arbogast v. American Exch. Nat. Bank*, 125 Fed. 518, 60 C. C. A. 538; *Mead v. Pettigrew*, 11 S. D. 529, 78 N. W. 945. Cf. *Case v. Hawkins*, 53 Miss. 702. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 102; *Cent. Dig.* § 242.

³¹ *Cox v. Robinson*, 82 Fed. 277, 27 C. C. A. 120; *Hanover Nat. Bank v. First Nat. Bank of Burlingame, Kan.*, 109 Fed. 421, 48 C. C. A. 482; *Wells Fargo & Co. v. Enright*, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; *Steinki v. Yetzer*, 108 Iowa, 512, 79 N. W. 286; *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 102-110; *Cent. Dig.* §§ 239-268.

is the president, vice president, cashier, or general manager, through whom and by whom the general and usual affairs of the corporation are transacted which custom or necessity has imposed upon the officer—such acts being incident to the execution of the trust reposed in him—may be performed by him without express authority; and in such cases it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of business as conducted by the corporation.”³²

And where the directors have surrendered the business to the president or another officer, and intrusted the manner of the execution to them, third persons are justified, when dealing with the officers, in assuming that they have the powers which, under the general course of business in the bank, they seem to have.³³

Indeed, it seems that it is the tendency of the courts today to assimilate the implied powers of the president, as chief executive officer of the bank, to those of the cashier.³⁴ Thus, it has been held that it is within the scope of the implied

³² Cox v. Robinson, 82 Fed. 277, 27 C. C. A. 120. See “Banks and Banking,” Dec. Dig. (Key No.) §§ 102-110; Cent. Dig. §§ 239-268.

³³ Ante, p. 311. See, also, Auten v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; Chemical Nat. Bank of New York v. Armstrong (C. C.) 76 Fed. 339, affirmed Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611; Cherry v. City Nat. Bank, 144 Fed. 587, 75 C. C. A. 343, affirmed Rankin v. City Nat. Bank of Kansas City, 208 U. S. 541, 28 Sup. Ct. 346, 52 L. Ed. 610; Citizens' Bank & Trust Co. v. Thornton, 174 Fed. 752, 98 C. C. A. 478; First Nat. Bank of Indianapolis v. New, 146 Ind. 411, 45 N. E. 597; City Nat. Bank of Hastings v. Thomas, 46 Neb. 861, 65 N. W. 895. See “Banks and Banking,” Dec. Dig. (Key No.) §§ 102-109; Cent. Dig. §§ 239-260.

³⁴ United States Nat. Bank v. First Nat. Bank, 79 Fed. 296, 24 C. C. A. 597; Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 130. See, also, People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907; Thomas v. City Nat. Bank of Hastings, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263.

He has general authority to receive a deposit. Hazelton v. Union

powers of the president to indorse negotiable paper in the ordinary transaction of the bank's business, and that a special authority to that end need not be conferred. "Such implied power," it was said, "is generally conceded to bank cashiers, and we know of no sufficient reason why the implied powers of the chief executive officer of a bank should be more limited in this respect than those of its cashier. * * *

It can hardly be expected that the cashier of a bank will be in attendance on all occasions when it becomes necessary for the bank to indorse notes and bills, draw drafts and checks, certify checks, or issue certificates of deposit. Such transactions as these are of hourly occurrence in all banks located in large business centers, and the exigencies of business demand that the power to perform such acts should be vested in some other officer, as well as in the cashier. Our observation teaches us that such power is very generally exercised by bank presidents; and in ordinary transactions no layman, we think, would hesitate to accept negotiable paper which had passed through a bank, because it was indorsed by the president, rather than by the cashier. In its practical operation the rule that a bank president has no implied power to indorse commercial paper for and in behalf of his bank would seriously interfere with the transaction of business and put the public to great inconvenience, while it would have no

Bank of Columbus, 32 Wis. 34. But see *Bickley v. Commercial Bank*, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721. In *Putnam v. United States*, 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118, it was held that the president of a national bank has not necessarily, by virtue of his office, power to draw checks against an account kept by his bank with another bank.

The president of a national bank has no power inherent in his office to bind the bank by the execution of a note in its name, but power to do so may be conferred on him by the directors, either expressly, by resolution to that effect, or by subsequent ratification, or by acquiescence in transactions of a similar nature, of which the directors have notice. *National Bank of Commerce v. Atkinson* (C. C.) 55 Fed. 465. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 102-109; *Cent. Dig.* §§ 239-260.

marked tendency to prevent fraud or breaches of trust on the part of the bank officers. The public interest requires that the same presumptions should attend an indorsement made by the president of a bank which exist in favor of an indorsement made by a cashier, and that banks should be held bound by acts of that nature when done by either of such officers in the ordinary course of business.”³⁵

CASHIER

82. The cashier is the executive officer through whom the financial operations of a bank are conducted, and he has by virtue of his office all the customary authority necessary for the discharge of such duties, such as authority to receive deposits and issue certificates of deposit, to draw and certify checks, to indorse negotiable paper in the ordinary course of business and for collection, to buy and sell exchange, and the like. Limitations upon his customary authority may be imposed, and greater authority may be expressly or impliedly conferred, by the directors, or, if the bank be unincorporated, by the banker; but persons dealing with him in relation to matters within the scope of such customary authority are not affected by limitations thereon of which they have not notice.

In General

“The cashier is the executive officer through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are

³⁵ *United States Nat. Bank v. First Nat. Bank*, 79 Fed. 296, 24 C. C. A. 597. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 102-109, 262; *Cent. Dig.* §§ 239-260, 1001-1006.

under his direction, and are, as it were, the arms by which designated portions of various functions are discharged.”³⁶ Being the bank’s executive officer, he has, in the absence of positive restrictions, all the powers necessary for such an officer in the legitimate business of banking.³⁷

The inherent or customary authority with which the cashier is vested by virtue of his office is consequently large. The directors may limit this authority as they see fit; but such limitations will not affect persons who, in ignorance of such limitations, deal with the cashier in relation to matters within the scope of the authority ordinarily confided to cashiers as determined by usage.³⁸ So, when, in the exercise of the customary authority of his office, he draws checks or makes notes, his signature as cashier is binding on the bank, although the charter may provide that all bills, notes, and contracts on behalf of the bank shall be signed by other designated officers.³⁹

³⁶ *Merchants’ Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 102–109, 262; *Cent. Dig.* §§ 239–260, 1003.

³⁷ See, *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557, 24 L. Ed. 490; *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602; *Bissell v. First Nat. Bank of Franklin*, 69 Pa. 415. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 102–109, 262; *Cent. Dig.* §§ 239–260, 1003.

³⁸ *Merchants’ Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Case v. Citizens’ Bank*, 100 U. S. 446, 25 L. Ed. 695; *Minor v. Mechanics’ Bank*, 1 Pet. 70, 7 L. Ed. 47; *Fleckner v. Bank of United States*, 8 Wheat. 360, 5 L. Ed. 631; *Matthews v. Massachusetts Nat. Bank*, Fed. Cas. No. 9,286, 1 Holmes, 396; *First Nat. Bank of Birmingham v. First Nat. Bank of Newport*, 116 Ala. 520, 22 South. 976; *Bank of Vergennes v. Warren*, 7 Hill (N. Y.) 91; *City Bank of New Haven v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332; *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Dec. 582; *Lloyd v. West Branch Bank*, 15 Pa. 172, 53 Am. Dec. 581. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* §§ 102–109; *Cent. Dig.* §§ 239–260.

³⁹ *Mechanics’ Bank v. Bank of Columbia*, 5 Wheat. 326, 5 L. Ed. 100; *Carey v. McDougald*, 7 Ga. 84; *Allison v. Hubbell*, 17 Ind. 559.

Of course, persons dealing with the cashier with notice of any limitation upon his authority can acquire no rights against the bank if he exceeds his actual authority.⁴⁰ And persons dealing with him are charged with knowledge of his apparent or customary authority, and if he exceeds it his acts are not binding upon the bank, unless he had actual authority to perform the acts.⁴¹ In such cases, however, it is not necessary to his authority to bind the bank that the directors should have expressly conferred upon him authority to perform the acts in question. If the directors habitually permit him to exercise powers other than those incident to his office, his authority to exercise them will be implied.⁴² And if the directors leave the control of the bank to the cashier, third persons in dealing with him are justified in assuming that he has the

See "Banks and Banking," Dec. Dig. (Key No.) §§ 105, 109; Cent. Dig. §§ 249-260.

⁴⁰ *Savannah Bank & Trust Co. v. Hartridge*, 73 Ga. 223. *See "Banks and Banking," Dec. Dig. (Key No.) §§ 102-109; Cent. Dig. §§ 239-260.*

⁴¹ *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457. *See "Banks and Banking," Dec. Dig. (Key No.) §§ 102-109; Cent. Dig. §§ 239-260.*

⁴² *Ante*, p. 311; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695.

A bank cannot recover the amount collected on a cashier's draft issued by its cashier and made payable to his individual creditor, where it is shown that the cashier had on numerous previous occasions drawn similar drafts in payment of his own debts, and such acts had continued for a period sufficiently long to establish a settled course of business in the conduct of the bank which had been sanctioned by its officers, and was known, or should have been known, to its directors. *Campbell v. National Broadway Bank*, 130 Fed. 699, 65 C. C. A. 664. *Cf. Gale v. Chase Nat. Bank*, 104 Fed. 214, 43 C. C. A. 496; *Rankin v. Chase Nat. Bank*, 188 U. S. 557, 23 Sup. Ct. 372, 47 L. Ed. 594.

Acquiescence by the officers in permitting the cashier to make loans to himself does not estop the bank from claiming that such loans are illegal under the state banking law. *Iowa State Sav. Bank v. Black*, 91 Iowa, 490, 59 N. W. 283. *See "Banks and Banking," Dec. Dig. (Key No.) §§ 102-109; Cent. Dig. §§ 239-260.*

powers which in the general course of business in the bank he seems to have, and his acts within such limits will bind the bank.⁴³ His acts on behalf of the bank within its corporate powers are, of course, binding upon the bank, if they are ratified by the directors.

Powers Inherent in Office

The powers of the cashier, which belong to him by virtue of his office, are, in general, those which enable him as an executive officer to conduct the financial operations of the bank in the legitimate business of banking. Accordingly, he has authority to receive deposits,⁴⁴ and to issue certificates of deposit;⁴⁵ to draw checks upon the funds of the bank deposited elsewhere;⁴⁶ to certify checks;⁴⁷ to buy and sell ex-

⁴³ Ante, p. 311; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; *Sherwood v. Home Savings Bank*, 131 Iowa, 528, 109 N. W. 9; *Davenport v. Stone*, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582; *National Bank of Tarentum v. Equitable Trust Co. of Pittsburg*, 223 Pa. 328, 72 Atl. 794. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 102-109; *Cent. Dig.* §§ 239-260.

⁴⁴ *President, etc., of State Bank v. Kain*, 1 Ill. 75; *Hanson v. Heard*, 69 N. H. 190, 38 Atl. 788. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 106; *Cent. Dig.* §§ 253-256.

⁴⁵ *Crystal Plate Glass Co. v. First Nat. Bank*, 6 Mont. 303, 12 Pac. 678. See, also, *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 106; *Cent. Dig.* §§ 253-256.

⁴⁶ *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008. Cf. *Pope v. Bank of Albion*, 57 N. Y. 126. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* §§ 257-260.

⁴⁷ *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667. Cf. *Mussey v. President, etc., of Eagle Bank*, 9 Metc. (Mass.) 306.

If he certifies without funds, the bank is liable thereon to an innocent holder of the check. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623; *Id.*, 16 N. Y. 125, 69 Am. Dec. 678. *Meads v. Merchants' Bank of Albany*, 25 N. Y. 143, 82 Am. Dec. 331. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 102, 109; *Cent. Dig.* §§ 243, 260.

change;⁴⁸ to indorse and transfer negotiable paper in the usual course of business;⁴⁹ to conduct the business of the bank incident to collections, and for that purpose to indorse negotiable paper;⁵⁰ to rediscount commercial paper;⁵¹ to borrow money in the usual course of business,⁵² and incidentally to execute notes for the bank,⁵³ and to pledge securities

⁴⁸ *Fleckner v. Bank of United States*, 8 Wheat. 338, 360, 5 L. Ed. 631; *Lafayette Bank v. Bank of Illinois*, Fed. Cas. No. 7,987, 4 McLean, 208. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 102, 109; Cent. Dig. §§ 243, 260.

⁴⁹ *Wild v. Bank of Passamaquoddy*, Fed. Cas. No. 17,646, 3 Mason, 505; *Farrar v. Gilman*, 19 Me. 440, 36 Am. Dec. 766; *City Bank of New Haven v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332. He may indorse in payment of debts. *Fleckner v. Bank of United States*, 8 Wheat. 338, 5 L. Ed. 631; *Lamb v. Cecil*, 25 W. Va. 288. But not in payment of a deposit. *Schneitman v. Noble*, 75 Iowa, 120, 39 N. W. 224, 9 Am. St. Rep. 467. See "*Banks and Banking*," Dec. Dig. (Key No.) § 109; Cent. Dig. § 260.

⁵⁰ *Warren v. Gilman*, 17 Me. 360; *National Bank of the Metropolis v. Williams*, 46 Mo. 17; *Elliot v. Abbot*, 12 N. H. 549, 37 Am. Dec. 227; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Hanson v. Heard*, 69 N. H. 190, 38 Atl. 788; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9. Cf. *Potter v. Merchants' Bank of Albany*, 28 N. Y. 641, 86 Am. Dec. 273. See "*Banks and Banking*," Dec. Dig. (Key No.) § 109; Cent. Dig. § 260.

⁵¹ *Blair v. First Nat. Bank*, Fed. Cas. No. 1,485, 2 Flip. 111. See, also, *Davenport v. Stone*, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 108, 109; Cent. Dig. §§ 260, 264.

⁵² *City Nat. Bank v. Chemical Nat. Bank*, 80 Fed. 859, 26 C. C. A. 195; *Cherry v. City Nat. Bank*, 144 Fed. 587, 75 C. C. A. 343; *Donnell v. Lewis County Savings Bank*, 80 Mo. 165; *Barnes v. Ontario Bank*, 19 N. Y. 152; *State Bank of Pike v. People's Nat. Bank of Franklinville* (Sup.) 118 N. Y. Supp. 641. See, also, *Coats v. Donnell*, 94 N. Y. 168. Cf. *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470. Contra: *First Nat. Bank of Corunna v. Michigan City Bank*, 8 N. D. 608, 80 N. W. 766. See "*Banks and Banking*," Dec. Dig. (Key No.) § 105; Cent. Dig. § 252.

⁵³ *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120. See "*Banks and Banking*," Dec. Dig. (Key No.) § 109; Cent. Dig. § 260.

to secure such loans made to the bank;⁵⁴ to receive payment of loans made by the bank, and to surrender notes and securities upon payment;⁵⁵ and to extend the time of payment of notes.⁵⁶

It is also a usual duty of the cashier to make or superintend the transfer of shares on the books of the bank,⁵⁷ and his act in making⁵⁸ or in refusing⁵⁹ to make a transfer is binding on the bank.

Powers Not Inherent

The cashier has no authority, unless it is conferred upon him by the directors, to bind the bank by acts and contracts which do not relate to the customary business of banking.⁶⁰

⁵⁴ *Citizens' Bank v. Bank of Waddy*, 126 Ky. 169, 103 S. W. 249, 11 L. R. A. (N. S.) 598, 128 Am. St. Rep. 282. Cf. *Union Nat. Bank of Kansas City v. Lyons*, 220 Mo. 538, 119 S. W. 540. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 109*; *Cent. Dig. § 260*.

⁵⁵ *Matthews v. Massachusetts Nat. Bank*, Fed. Cas. No. 9,286, Holmes, 396.

In the absence of special restrictions, known to the sureties on a note payable to a bank, the apparent scope of the authority of the cashier includes an agreement by him with the sureties to proceed to make the debt, if practicable, out of lands owned by the maker and pointed out to the cashier by the sureties. *Security Savings Bank of Wellman v. Smith*, 144 Iowa, 203, 122 N. W. 826. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 108*; *Cent. Dig. § 264*.

⁵⁶ *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602. Cf. *Bank of East Tennessee v. Hooke*, 1 Cold. (Tenn.) 156. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 109*; *Cent. Dig. § 260*.

⁵⁷ *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039. See "*Banks and Banking*," *Dec. Dig. (Key No.) §§ 40, 104*; *Cent. Dig. §§ 51, 248*.

⁵⁸ *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039. See "*Banks and Banking*," *Dec. Dig. (Key No.) §§ 40, 104*; *Cent. Dig. §§ 51, 248*.

⁵⁹ *Case v. Citizens' Bank*, 100 U. S. 446, 25 L. Ed. 695. See "*Banks and Banking*," *Dec. Dig. (Key No.) §§ 40, 104*; *Cent. Dig. §§ 51, 248*.

⁶⁰ *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 316; *Morse v. Massachusetts Nat. Bank*, Fed. Cas. No. 9,857, 1 Holmes, 209; *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rush-*

Thus, it has been held that he has not, by virtue of his office, authority to make a contract involving the payment of money not loaned by the bank in the customary way;⁶¹ to compromise⁶² or to release⁶³ a claim; to discharge a surety;⁶⁴ to bind the bank by a promise to one about to indorse a note for discount that he shall not be held liable upon the indorsement;⁶⁵ to sell or transfer the personal property of the bank, other than negotiable paper;⁶⁶ to transfer nonnegotiable paper;⁶⁷ to pledge property for the payment of an

ville, 62 Neb. 472, 87 N. W. 156; *Id.*, 69 Neb. 220, 95 N. W. 819; *North Star Boot & Shoe Co. v. Stebbins*, 2 S. D. 74, 48 N. W. 833. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 102, 105; *Cent. Dig.* §§ 243, 252.

⁶¹ See *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 252.

⁶² *Farmers' & Mechanics' Bank v. Clancy*, 163 Mich. 586, 128 N. W. 752; *Bank of Commerce v. Hart*, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479. But see *Security Savings Bank of Wellman v. Smith* (Iowa) 119 N. W. 726. Cf. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 252.

⁶³ *Ecker v. First Nat. Bank of New Windsor*, 59 Md. 291; *Hodge's Ex'r v. First Nat. Bank*, 63 Va. 51. Cf. *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 252.

⁶⁴ *Gray v. Farmers' Nat. Bank*, 81 Md. 631, 32 Atl. 518; *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* § 260.

⁶⁵ *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 316; *State Bank of Moore v. Forsyth*, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.) 501. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* § 264.

⁶⁶ *Asher v. Sutton*, 31 Kan. 286, 1 Pac. 535; *Greenawalt v. Wilson*, 52 Kan. 109, 34 Pac. 403; *Holt v. Bacon*, 25 Miss. 567. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 248.

⁶⁷ *Barrick v. Austin*, 21 Barb. (N. Y.) 241. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* § 260.

antecedent debt;⁶⁸ to sell or purchase or mortgage real estate;⁶⁹ to lease real estate;⁷⁰ to make a contract with the government for the transfer of money.⁷¹

The authority of the cashier does not extend to transactions that are without the corporate powers.⁷² It is confined to transactions which are for the benefit of the bank. It does not extend, for example, to the making of accommodation paper.⁷³ Nor does it extend to a transaction which is for the benefit of the cashier personally, and one dealing with him with notice that such is the character of the transaction can acquire no rights thereby against the bank, unless the transaction was actually authorized, either expressly or by implication.⁷⁴

⁶⁸ *State of Tennessee v. Davis*, 50 How. Prac. (N. Y.) 447. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 248.

⁶⁹ *Bank of Gloster v. Hindman*, 95 Miss. 742, 50 South. 65; *Winsor v. Lafayette County Bank*, 18 Mo. App. 665; *Leggett v. New Jersey Mfg. & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 248.

⁷⁰ *Spongberg v. First Nat. Bank of Montpelier*, 18 Idaho, 524, 110 Pac. 716, 31 L. R. A. (N. S.) 736. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 248.

⁷¹ *United States v. City Bank of Columbus*, 21 How. 356, 16 L. Ed. 130. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 252.

⁷² *Farmers' & Merchants' Nat. Bank v. Smith*, 77 Fed. 129, 23 C. C. A. 80; *Grow v. Cockrill*, 63 Ark. 418, 39 S. W. 60, 36 L. R. A. 89. Cf. *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 102; *Cent. Dig.* § 243.

⁷³ *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557, 24 L. Ed. 490; *First Nat. Bank of Duncan v. Anderson*, 141 Fed. 926, 73 C. C. A. 160.

The bank is bound in favor of a holder in due course. *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Houghton v. First Nat. Bank of Elkhorn*, 26 Wis. 663, 7 Am. Rep. 107. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* § 260.

⁷⁴ *Anderson v. Kissam* (C. C.) 35 Fed. 699 (cf. *Kissam v. Anderson*, 145 U. S. 435, 12 Sup. Ct. 960, 36 L. Ed. 765); *State Nat. Bank v. Newton Nat. Bank*, 66 Fed. 691, 14 C. C. A. 61; *Lamson v. Beard*, 94

Signature to Negotiable Instrument

While, as a rule, one who is not named as a party to a negotiable instrument cannot maintain an action or be charged thereon, by usage the name of the cashier of a bank, with his title, "Cashier," has become established as the alternative designation of the bank. Where paper is so payable to him, an action may be maintained thereon by the bank,⁷⁵ or by the cashier;⁷⁶ and, when indorsed by him in the same form, the indorsement is the indorsement of the bank, which may be charged thereon.⁷⁷

Fed. 31, 36 C. C. A. 56, 45 L. R. A. 822; Home Savings Bank of Iowa Falls v. Otterbach, 135 Iowa, 157, 112 N. W. 769, 124 Am. St. Rep. 267; Hier v. Miller, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952; Langlois v. Gragnon, 123 La. 453, 49 South. 18, 22 L. R. A. (N. S.) 414; Lee v. Smith, 84 Mo. 304, 54 Am. Rep. 101; Mendel v. Boyd, 71 Neb. 657, 99 N. W. 493; Campbell v. Manufacturers' Nat. Bank, 67 N. J. Law, 301, 51 Atl. 497, 91 Am. St. Rep. 438; Ellis v. First Nat. Bank, 22 R. I. 565, 48 Atl. 936. Cf. Preston v. Cutter, 64 N. H. 461, 13 Atl. 874.

The cashier has no authority, by virtue of his office, to certify his own check, or to issue cashier's drafts to his own order in payment of his debts. Gale v. Chase Nat. Bank, 104 Fed. 214, 43 C. C. A. 496. See "*Banks and Banking*," *Dec. Dig. (Key. No.)* §§ 105, 117; *Cent. Dig.* §§ 252, 288.

⁷⁵ Baldwin v. Bank of Newbury, 1 Wall. 234, 17 L. Ed. 534; Darby v. Berney Nat. Bank, 97 Ala. 643, 11 South. 881; Hobbs v. Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348; Nave v. First Nat. Bank of Lebanon, 87 Ind. 204; President, etc., of Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; First Nat. Bank of Angelica v. Hall, 44 N. Y. 395, 4 Am. Rep. 698. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 123; *Cent. Dig.* §§ 260-267.

⁷⁶ McHenry v. Ridgley, 2 Scam. (Ill.) 309, 35 Am. Dec. 110; Fairfield v. Adams, 16 Pick. (Mass.) 381. See "*Bills and Notes*," *Dec. Dig. (Key No.)* § 123; *Cent. Dig.* §§ 260-267.

⁷⁷ Collins v. Johnson, 16 Ga. 458; Bank of State v. Wheeler, 21 Ind. 90; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Bank of New York v. State Bank of Ohio, 29 N. Y. 619; Houghton v. First Nat. Bank of Elkhorn, 26 Wis. 663, 7 Am. Rep. 107.

"Where an instrument is drawn or indorsed payable to a person as 'cashier' * * * of a bank, it is deemed to be prima facie pay-

TELLERS AND SUBORDINATE OFFICERS

83. The tellers and other subordinate officers are under the direction of the cashier. A receiving teller has authority to receive deposits, and a paying teller to pay and usually to certify checks.

The tellers and other subordinate officers of the bank are under the direction of the cashier, and "are, as it were, the arms by which designated portions of various functions are discharged."⁷⁸ Usually there is a paying teller and a receiving teller, who are charged with the respective duties of paying checks presented for payment and of receiving deposits, although the two functions may be united in a single teller.⁷⁹ The receiving teller is, of course, a proper officer to receive a deposit, and it has been held that, if a deposit is made with the paying teller he becomes the depositor's agent; the transaction being outside the ordinary scope of his employment.⁸⁰

able to the bank * * * of which he is such officer, and may be negotiated by either the indorsement of the bank * * * or the indorsement of the officer." Negotiable Instruments Law, § 42. See "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 183, 197; *Cent. Dig.* §§ 444, 487.

⁷⁸ *Merchant's Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008.

Where the cashier had entire control of the bank, and gave the teller authority to receive special deposits, the teller's act in receiving such a deposit bound the bank. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582.

As to functions of a note teller, see *Marine Bank v. Ferry's Adm'rs*, 40 Ill. 255. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 102, 106, 109; *Cent. Dig.* §§ 239, 256, 257.

⁷⁹ A receiving and paying teller had apparent authority to receive a note for collection. *City Nat. Bank of Ft. Worth v. Martin*, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 112; *Cent. Dig.* § 272.

⁸⁰ *Thatcher v. Bank of State of New York*, 5 Sandf. (N. Y.) 121. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 106, 121; *Cent. Dig.* § 298.

But a deposit with the paying teller, found behind the counter employed in the bank's business, at his request, it appearing that in the absence of the receiving teller other officers acted in his place, has been held to bind the bank.⁸¹ It is usually within the authority of the paying teller to certify checks.⁸²

ADMISSIONS AND REPRESENTATIONS

84. In accordance with the general rule of agency, a statement made by the cashier or other officer of a bank, in and as a part of an authorized transaction for the bank, is binding upon it, and may be the basis of an estoppel, or a ground for rescission, or for the recovery of damages in an action of deceit.

In General

It is a general rule, applicable to corporations as well as to individuals, that the statement of an agent is evidence against his principal, when it is made with his authority, or when it is made by the agent in the transaction for his principal of some authorized business, to which it had reference and with which it was connected, so as to be part of that transaction.⁸³ This rule applies, of course, to statements made by the officers and agents of banks. A statement made by the cashier or other officer, in and as a part of an authorized transaction for the bank, is binding upon it, and, if false, may be the basis of an estoppel, or a ground for rescinding the transaction, or for the recovery of damages in an action for deceit,

⁸¹ *East River Nat. Bank v. Gove*, 57 N. Y. 597. See, also, *Second Nat. Bank v. Averell*, 2 App. D. C. 470, 25 L. R. A. 761. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 106, 121; *Cent. Dig.* § 298.

⁸² *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678; ante, p. 141. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 106; *Cent. Dig.* § 256.

⁸³ *Tiffany, Agency*, 247.

according to the circumstances of the particular transaction.⁸⁴ Thus, if the cashier states to a surety on a note that it is paid, whereby the surety is induced to surrender to the bank property of the principal debtor, the bank is estopped to deny the truth of the statement.⁸⁵ If an officer has authority to procure a discount of paper held by the bank, and induces another bank to discount the paper by fraudulent representations concerning it, the bank which makes the discount may rescind the transaction, or may maintain an action for damages caused by the deceit.⁸⁶

On the other hand, a bank is not bound by a statement of its officer, if he is not authorized to make it, or it is not part of an authorized transaction.⁸⁷ The declaration of a director, when he is not specially authorized in the matter, is

⁸⁴ Binghampton Trust Co. v. Auten, 68 Ark. 299, 57 S. W. 1105, 82 Am. St. Rep. 295; Carr v. National Bank & Loan Co. of Watertown, 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725.

Where a bank discounted a certified check on the strength of a statement of the teller of the certifying bank that the certification was good, and the teller failed to state that payment had been stopped, the drawee bank, by failure to state that fact, was estopped to deny its liability. Clews v. Bank of New York Nat. Banking Ass'n, 89 N. Y. 418, 42 Am. Rep. 303. See "*Banks and Banking*," Dec. Dig. (Key No.) § 111; Cent. Dig. §§ 269, 270.

⁸⁵ Franklin Bank v. Steward, 37 Me. 519; Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67. See "*Banks and Banking*," Dec. Dig. (Key No.) § 111; Cent. Dig. §§ 269, 270.

⁸⁶ Binghampton Trust Co. v. Auten, 68 Ark. 299, 57 S. W. 1105, 82 Am. St. Rep. 295. See "*Banks and Banking*," Dec. Dig. (Key No.) § 111; Cent. Dig. §§ 269, 270.

⁸⁷ Henry v. Northern Bank of Alabama, 63 Ala. 527; Merchants' Bank v. Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300; Union Banking Co. of Baltimore City v. Gittings, 45 Md. 181; Wyman v. President, etc., of Hallowell & Augusta Bank, 14 Mass. 58, 7 Am. Dec. 194; President, etc., of Salem Bank v. President, etc., of Gloucester Bank, 17 Mass. 21, 9 Am. Dec. 111; Mapes v. Second Nat. Bank of Titusville, 80 Pa. 163; Hazelton v. Union Bank of Columbus, 32 Wis. 34.

A statement of a teller that an indorsement was good held not

not binding.⁸⁸ A cashier does not act as the agent of the bank in answering an inquiry addressed to him by a person as to the business standing of a third person; his act being a mere voluntary statement, and not relating to the business of the bank.⁸⁹ Nor does he bind the bank by answering an inquiry by one about to become a surety on the bond of a fellow employé as to the condition of his account, or as to other matters in respect to which it is not a part of his duty to make statements.⁹⁰ The bank is not chargeable with representations made by an officer, where he is acting in his own interest and adversely to that of the bank.⁹¹

to bind the bank. *Walker v. St. Louis Nat. Bank*, 5 Mo. App. 214. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 111; *Cent. Dig.* §§ 269, 270.

⁸⁸ *East River Bank v. Hoyt*, 41 Barb. (N. Y.) 441; post, p. 341. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 111; *Cent. Dig.* §§ 269, 270.

⁸⁹ *First Nat. Bank v. Marshall & Ilsley Bank*, 83 Fed. 725, 28 C. C. A. 42; *Taylor v. Commercial Bank*, 174 N. Y. 181, 66 N. E. 726, 62 L. R. A. 783, 95 Am. St. Rep. 564. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 111; *Cent. Dig.* §§ 269, 270.

⁹⁰ *United States Fidelity & Guaranty Co. v. Muir*, 115 Fed. 264, 53 C. C. A. 56; *Lieberman v. First Nat. Bank of Wilmington*, 8 Del. Ch. 229, 40 Atl. 382. See, also, *Ida County Savings Bank v. Seidensticker* (Iowa) 92 N. W. 862.

A president of a national bank has no power, in the ordinary course of business, to certify to the fidelity or integrity of the cashier for the purpose of enabling him to procure a bond insuring his fidelity; and hence the bank cannot be deemed, merely by virtue of the president's relation to it, to have any knowledge of the giving by him of such certificate. *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977. Cf. *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; *Willoughby v. Fidelity & Deposit Co. of Maryland*, 16 Okl. 546, 85 Pac. 713, 7 L. R. A. (N. S.) 548, affirmed *Cherry v. Fidelity & Deposit Co.*, 205 U. S. 537, 27 Sup. Ct. 790, 51 L. Ed. 920; *Warren Deposit Bank v. Fidelity & Deposit Co. of Maryland*, 116 Ky. 38, 75 S. W. 1111. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 111; *Cent. Dig.* §§ 269, 270.

⁹¹ *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. 345,

Torts and Wrongful Acts

A private corporation is generally liable for the torts of its servants and agents, committed in the course of their employment, to the same extent as a natural person would be.⁹² The questions which are material here relate principally to the torts arising from fraud. In general, it may be said that a bank is liable for fraud of its agent, committed by a false representation for its benefit, when the representation is made as an inducement to a third person in a transaction which is within the scope of the agent's actual or of his apparent authority, unless the person dealing with the agent and injured by the fraud has notice that the transaction or the representation is unauthorized.⁹³ Thus, where a bank, in order to increase deposits or to sell its collateral, through its board of directors makes or causes to be made false statements concerning the financial condition of its customers, to a third person, for the purpose of misleading him, it is liable for deceit if loss results.⁹⁴ And where the cashier, in the course of an authorized transaction, makes a false statement of the same character and to the same end, the bank is liable in tort to one injured thereby, although the cashier was not expressly

28 L. Ed. 385; *State Savings Bank of Ionia v. Montgomery*, 126 Mich. 327, 85 N. W. 879; post, p. 339. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 111; *Cent. Dig.* §§ 269, 270.

⁹² *Clark, Corp.* (2d Ed.) 193, 510.

⁹³ Ante, p. 311; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 112; *Cent. Dig.* §§ 271, 272.

⁹⁴ *Hindman v. First Nat. Bank*, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210.

The directors of the F. National Bank made four reports to the comptroller of the currency, under the provisions of the National Banking Law, all of which were false. The officers and directors published and distributed to the stockholders of the bank a statement representing that the bank was in a very flourishing condition, whereas in fact it was insolvent, and was known to the officers and directors to be so. The M. Bank, believing these representations to be true, discounted a note for one J., solely upon

authorized by the board of directors to make such statement.⁹⁵ So, a bank may be held for conspiracy with others resulting in injury to a third person.⁹⁶ While a bank is under no duty to safeguard and supervise a trust account, or to look after the appropriation of the funds when withdrawn,⁹⁷ if the directors, by failing in their duty to supervise and control, permit the cashier to have complete control over the business, so that he is able for a long time to commit irregularities and misappropriate such funds deposited in his own name personally as trustee, the bank may be held liable for the funds misappropriated; the neglect of directors being responsible for the cashier's opportunity to misappropriate them.⁹⁸

the security of certain shares of stock of the F. Bank, which ultimately turned out to be worthless. There was no connection or communication between the F. Bank and the M. Bank or J. Held, that the F. Bank could not be held liable to the M. Bank for deceit, since there was no privity between them, and it was not in the power of the officers to bind the bank by representations to a mere stranger to induce him to enter into a transaction in which the bank was not at all interested. *Merchants' Nat. Bank v. Armstrong* (C. C.) 65 Fed. 932. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 112; *Cent. Dig.* §§ 271, 272.

⁹⁵ *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 112; *Cent. Dig.* §§ 271, 272.

⁹⁶ *Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499; *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709; *Johnston Fife Hat Co. v. National Bank of Guthrie*, 4 Okl. 17, 44 Pac. 192. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 112; *Cent. Dig.* §§ 271, 272.

⁹⁷ *Ante*, p. 45.

⁹⁸ *Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408. See, also, *National Bank of Oshkosh v. Munger*, 95 Fed. 95, 36 C. C. A. 659. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 112; *Cent. Dig.* §§ 271, 272.

NOTICE

85. IN GENERAL—In accordance with the general rule of agency, when, in the course of his employment, an officer or other agent of a bank acquires knowledge or receives notice of any fact material to the business in which he is employed, the bank is deemed, as a rule, to have notice of such fact; and in most jurisdictions knowledge of a fact material to the business in which the agent is employed, if actually present in his mind during the agency and while acting in the bank's behalf, although acquired by him outside of his agency, is deemed, as a rule, notice to the bank.

86. DISCLOSURE AGAINST INTEREST—The knowledge of the agent will not be imputed to the bank, when the agent is engaged in committing an independent fraudulent act upon his own account, and the knowledge sought to be imputed is of facts which relate to that act, and which, if communicated, would prevent the consummation of the fraud, or when the agent is openly acting on his own behalf, or on behalf of another in a transaction with the bank; but when, in any transaction, the agent does an act as the sole representative of the bank, and is not acting openly on behalf of himself or another, although his conduct may be fraudulent, it is generally held that the bank may not avail itself of the act, in order to retain an advantage or to assert a claim founded thereon, without being charged with his knowledge.

Notice—In General

It is a general rule of agency, which is, of course, applicable to the officers and agents of banks, incorporated and unin-

incorporated, that when, in the course of his employment, the agent receives notice or acquires knowledge of any fact material to the business in which he is employed, the principal is deemed to have notice of that fact.⁹⁹ Not only is a notice communicated to any officer authorized to receive it notice to the bank,¹⁰⁰ but the bank is charged with knowledge of any fact material to its business acquired by any officer while transacting such business.¹⁰¹

To affect the bank with notice, the matter known to the agent must be something within the scope of his agency; that is, a matter which it is his duty, in the capacity in which he is employed, to communicate to the bank, or in reference to which he has authority to act.¹⁰² Knowledge acquired by the officer outside of his agency will not be imputed to the bank. But, although knowledge so acquired is not notice to the bank,

⁹⁹ Tiffany, Ag. 257.

¹⁰⁰ Canadian Bank of Commerce v. Coumbe, 47 Mich. 358, 11 N. W. 196; Second Nat. Bank of St. Paul v. Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744.

A bank is charged with notice of letters duly mailed to it and received by the general bookkeeper, whose duty it is to open and distribute mail, though he conceals such letters to hide irregularities in his office, and thereby prevents their coming into the hands of the other bank officers. First Nat. Bank v. Fourth Nat. Bank, 56 Fed. 967, 6 C. C. A. 183. See "*Banks and Banking*," Dec. Dig. (Key No.) § 116; Cent. Dig. §§ 282-287.

¹⁰¹ Harris v. American Building & Loan Ass'n, 122 Ala. 545, 25 South. 200; Hager v. National German-American Bank, 105 Ga. 116, 31 S. E. 141; Baldwin v. Davis, 118 Iowa, 36, 91 N. W. 778; Orme v. Baker, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 968; Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847. See "*Banks and Banking*," Dec. Dig. (Key No.) § 116; Cent. Dig. §§ 282-287.

¹⁰² Curtice v. Crawford County Bank (C. C.) 110 Fed. 830; McCalmont v. Lanning, 154 Fed. 353, 84 C. C. A. 138; Morris v. First Nat. Bank of Samson, 162 Ala. 301, 50 South. 137; Marsh, Merwin & Lemon v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. Rep. 40; Organized Charities Ass'n v. Mansfield, 82 Conn. 504, 74 Atl. 781, 135 Am. St. Rep. 285; Washington Nat. Bank v. Pierce, 6

it is generally held that such knowledge of the agent, if afterwards actually present in his mind during his agency, while he is acting for the bank in a transaction to which the knowledge is material, will be imputed to the bank.¹⁰³ It must be established by the person asserting notice that the knowledge was thus present in the agent's mind; but the burden would be sustained in any case if the knowledge had been acquired so recently as to make it incredible that he should have forgotten it.¹⁰⁴ Where the agency is continuous, as in the case of the cashier or other officer of a bank, knowledge acquired or notice received by him as agent, being necessarily imputed to his principal, will, of course, bind the bank in any subsequent transaction by him as agent, without proof that he re-

Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174. See, also, *First Nat. Bank of West Minneapolis v. Persall*, 110 Minn. 333, 125 N. W. 506, 136 Am. St. Rep. 499.

That the president or cashier of a bank which purchased municipal bonds had notice or knowledge of facts which would have required inquiry as to what the bonds were given for, had he made the purchase, is not notice to the bank, where the purchase was not made by him, but by the other, having no such notice or knowledge. *Thompson v. Village of Mecosta*, 141 Mich. 175, 104 N. W. 694.

A bank was not affected by information given to its messenger by a member of a former partnership, to which a draft on which the partnership was liable and which had been renewed was presented, to the effect that the partnership was dissolved and the other partner liable for its debts; the information not being communicated to the bank, and the messenger's agency being confined to mere collections. *Camp v. Southern Banking & Trust Co.*, 97 Ga. 582, 25 S. E. 362. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹⁰³ *Campbell v. First Nat. Bank*, 22 Colo. 177, 43 Pac. 1007; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 398. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹⁰⁴ *Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

tained in his memory,¹⁰⁶ and will bind the bank, even in transactions conducted by other agents.¹⁰⁶

The cashier being the officer of the bank by whom its financial transactions are conducted, the bank is generally bound by his knowledge. Thus, if the cashier, or any other officer authorized to act, accepts collaterals with knowledge that the debtor holds them in trust, or for any other reason is not authorized to pledge them, the bank is charged with such knowledge.¹⁰⁷ So, if he accepts a mortgage with knowledge of a prior mortgage;¹⁰⁸ or discounts a note with notice of defenses;¹⁰⁹ or receives a payment from an individual with knowledge that the money belongs to a trust estate;¹¹⁰ or receives a deposit with knowledge that the bank is insol-

¹⁰⁶ *Curtice v. Crawford County Bank*, 118 Fed. 390, 56 C. C. A. 174; *Holden v. New York & E. Bank*, 72 N. Y. 286; *Footte v. Utah Commercial & Savings Bank*, 17 Utah, 283, 54 Pac. 104. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹⁰⁶ *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Birmingham Trust & Savings Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 13 South. 112, 20 L. R. A. 600; *United States Nat. Bank v. Forstedt*, 64 Neb. 855, 90 N. W. 919. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹⁰⁷ *Zeis v. Potter*, 105 Fed. 671, 44 C. C. A. 665; *Loring v. Brodie*, 134 Mass. 453; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98; *Groff v. Stitzer*, 75 N. J. Eq. 452, 72 Atl. 970. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹⁰⁸ *Ottaquechee Savings Bank v. Holt*, 58 Vt. 166, 1 Atl. 485. See, also, *Christie v. Sherwood*, 113 Cal. 526, 45 Pac. 820. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹⁰⁹ *Citizens' Savings Bank v. Walden (Ky.)* 52 S. W. 953; *Fall River Union Bank v. Sturtevant*, 12 Cush. (Mass.) 372; *Ft. Dearborn Nat. Bank v. Seymour*, 71 Minn. 81, 73 N. W. 724; *Merchants' & Planters' Bank v. Penland*, 101 Tenn. 445, 47 S. W. 693. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹¹⁰ *Loring v. Brodie*, 134 Mass. 453; *First Nat. Bank of Bethlehem v. Peisert*, 2 Penny. (Pa.) 277. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

vent;¹¹¹ or pays money to one person with notice that it belongs to another.¹¹²

Since the directors have power to bind the bank only when acting as a board, knowledge acquired by a director individually, and not while acting in his official capacity as a member of the board, will not be imputed to the bank.¹¹³ Notice communicated to the board, of course, binds the bank, and it seems that notice communicated to a director for the purpose of being communicated to the directors is likewise binding.¹¹⁴ If, while acting as a member of the board, a director has actual knowledge of some fact material to the business in hand, although he acquired the knowledge unofficially, the bank will

¹¹¹ *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹¹² *McCann v. State*, 4 Neb. 324. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹¹³ *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *First Nat. Bank of Highstown v. Christopher*, 40 N. J. Law, 435, 29 Am. Rep. 262; *Bank of United States v. Davis*, 2 Hill (N. Y.) 452; *Westfield Bank v. Cornen*, 37 N. Y. 320, 93 Am. Dec. 573; *Atlantic State Bank of City of Brooklyn v. Savery*, 82 N. Y. 291; *Memphis Nat. Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. Rep. 788.

That a bank director is also director in a corporation whose note the bank discounts is not notice to it of equities between the parties. *Casco Nat. Bank of Portland v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705.

A bank is not charged with knowledge of the character of negotiable paper by the mere fact that it discounts it on the recommendation of a director, if the latter does not control its discretion or discount the paper himself as an officer or agent of the bank. *Shaw v. Clark*, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹¹⁴ *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *National Bank v. Norton*, 1 Hill (N. Y.) 572 (semble); *Union Bank v. Camp-*

be affected by his knowledge, subject to the exceptions referred to in the following paragraph.¹¹⁵

Disclosure Against Interest

It is commonly said that the rule that a principal is bound by the knowledge of his agent is based on the principle that it is the agent's duty to communicate the knowledge which he has respecting the subject-matter of the agency and the presumption that he has done his duty.¹¹⁶ To the rule there are some exceptions. Thus, notice will not be imputed to the principal, if the fact of which the agent has knowledge was acquired by the agent confidentially as agent for another, under such circumstances that it would be a betrayal of confidence and a breach of his duty to the other principal to disclose it.¹¹⁷

Another exception is that the knowledge of the agent will not be imputed to the principal when the agent is engaged in committing an independent fraud upon his own account, either against his principal or another, and the knowledge sought to be imputed is of facts which relate to the fraud, so that the communication of such knowledge would necessarily prevent the consummation of the fraud.¹¹⁸ The principal is not bound in such cases, it is said, when the character of and nature of the agent's knowledge make it intrinsically improbable that

Bell, 4 Humph. (Tenn.) 394. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹¹⁵ *National Security Bank v. Cushman*, 121 Mass. 490. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 116; *Cent. Dig.* §§ 282-287.

¹¹⁶ *Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167. See "*Principal and Agent*," *Dec. Dig. (Key No.)* §§ 177-182; *Cent. Dig.* §§ 670-690.

¹¹⁷ *Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769. See "*Principal and Agent*," *Dec. Dig. (Key No.)* § 179; *Cent. Dig.* §§ 685-688.

¹¹⁸ *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Lamson v. Beard*, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822; *Ft. Dearborn Nat. Bank of Chicago v. Seymour*, 71 Minn. 81, 73 N. W. 724; *State Bank of Moore v. Forsyth*, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.) 501; *Mayor, etc., of New York v.*

he will inform his principal.¹¹⁹ Whether the rule and the exception rest upon the presumption that the agent will or will not communicate the facts to his principal has been doubted.¹²⁰ But, whatever the reason for the exception, it is well established.

Again, if the agent is openly acting on his own behalf, and necessarily adversely to his principal, his knowledge will not be imputed to the latter, since he does not represent him.¹²¹ Thus, a director or other officer, offering to the bank for discount a note of which he is the owner,¹²² or proposing for a

Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618; *Findley v. Cowles*, 93 Iowa, 389, 61 N. W. 998. See "*Principal and Agent*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* § 690.

¹¹⁹ *Hilliard v. Lyons*, 180 Fed. 685, 103 C. C. A. 651; *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Knobeloch v. Germania Savings Bank*, 50 S. C. 259, 27 S. E. 962. See, also, *Bank of Overton v. Thompson*, 118 Fed. 798, 56 C. C. A. 554. See "*Principal and Agent*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* § 690.

¹²⁰ "It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master." *Allen v. South Boston R. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185. See, also, *Gunster v. Scranton Illuminating Heat & Power Co.*, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650; *Knobloch v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962; *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658. See "*Principal and Agent*," *Dec. Dig. (Key No.)* § 181; *Cent. Dig.* § 690.

¹²¹ *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734; *First Nat. Bank of Brandon v. Briggs' Assignees*, 70 Vt. 594, 41 Atl. 580. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

¹²² *Merchants' Nat. Bank of Kansas City v. Lovitt*, 114 Mo. 519,

loan of money on collateral security alleged to be his own property,¹²³ stands as a stranger to the bank, and his knowledge will not be imputed to the bank. "While the general doctrine is recognized that what an agent knows his principal is charged with notice of, in transactions where said agent is acting for the principal, yet a bond director, in asking for a discount of his own paper, is not an agent of the bank, but acting as the adverse contracting party. Were this held otherwise, no bank could discount paper, to which a director is a party, without losing the position of an innocent indorsee for value under the law merchant. Hence no bank could have

21 S. W. 825, 35 Am. St. Rep. 770; *Benton v. German-American Nat. Bank*, 122 Mo. 332, 26 S. W. 975. See, also, *Louisiana State Bank v. Senecal*, 13 La. 525; *State Sav. Bank of Ionia v. Montgomery*, 126 Mich. 327, 85 N. W. 879.

"If Linley alone had acted in discounting the note, and in placing the proceeds to his own credit, the bank would be bound by his knowledge of the circumstances under which he had obtained it from the defendants. * * * But he did not act alone. The cashier of the bank was the officer who actually did these things. Linley, in this transaction, was not the representative of the bank." *First Nat. Bank of Grafton v. Babbidge*, 160 Mass. 563, 36 N. E. 462.

Notice or knowledge of failure of consideration of a note, which the director of a bank sells to it before the maturity, is not imputable to the bank, when in the transaction the seller did not act for it at all, but exclusively for himself, and the bank was represented by another of its officials, who alone acted for it. *English-American Loan & Trust Co. v. Hiers*, 112 Ga. 823, 38 S. E. 103. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

¹²³ The fact that one who wrongfully pledges to a bank, as security for a loan made to him, goods consigned to him for sale was a director in such bank, does not commit the bank to knowledge of the wrong. *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710. See, also, *President, etc., of Washington Bank v. Lewis*, 22 Pick. (Mass.) 24. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

dealings in commercial paper with any of its directors on ordinary business principles." ¹²⁴

Some cases hold that if the officer, although acting avowedly on his own behalf, participated in the action of the bank, as by acting with the discount committee or the directors in passing upon the discount or loan, his knowledge will be imputed to the bank.¹²⁵ But it seems that the true test is whether the officer was openly acting in his own behalf, and not as the representative of the bank.¹²⁶ "The proposition that a director of a corporation," it was said in a leading case, "acting avowedly for himself or on behalf of another, with whom he is interested in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority.

* * * In some of these cases, weight appears to be given to the fact that the director was not actually present at the meeting when the transaction was concluded; but this cannot be of importance. If it were shown that Burgess urged

¹²⁴ Third Nat. Bank v. Harrison (C. C.) 10 Fed. 243. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 116, 117; Cent. Dig. §§ 282-288.

¹²⁵ Where the president and the cashier were the discount committee, and participated in discounting a note in which the president was payee, the bank was charged with his knowledge. Le Duc v. Moore, 111 N. C. 516, 15 S. E. 888. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 116, 117; Cent. Dig. §§ 282-288.

¹²⁶ Where the president, who with the cashier, constitute the discount committee, takes part in discounting a note payable to him, his knowledge is not imputable to the bank. Graham v. Orange County Nat. Bank, 59 N. J. Law, 225, 35 Atl. 1053.

"If, therefore, the Thomases be considered as having acted with the other three members of the discount committee, because of their presence at its meeting and the requirement of the by-law that the 'paper accepted by the committee should 'receive the unanimous consent of all members present at the meeting before being entered,' we nevertheless think that notice of the alleged fraud of the Thomases cannot be imputed to plaintiff." Lilly v. Hamilton Bank of New York, 178 Fed. 53, 102 C. C. A. 1, 29 L. R. A. (N. S.) 558. See, also, Terrell v. Branch Bank at Mobile, 12 Ala. 502. See "*Banks and Banking*," Dec. Dig. (Key No.) §§ 116, 117; Cent. Dig. §§ 282-288.

the loan upon the board of directors, and actually voted in favor of it, his associates not seeing fit to intervene or object to this conduct, he would still have acted on his own behalf, and of those whose interests and efforts were of necessity adverse to those of the corporation. To assume that, under such circumstances, the facts he knew were communicated to the directors, and that he laid before them the fraud he was committing in wrongfully pledging property, would be a presumption too violent for belief, and would do great injustice to the remaining directors and the interests they represented."¹²⁷ The principle is the same where the bank officer in such a case is openly acting as an officer of another corporation,¹²⁸ or otherwise as the representative of another person,¹²⁹ for in such case the officer, in procuring the discount or loan, represents the adverse party.

Cases where the bank is not charged with the knowledge of its officer because he is engaged in committing an independent fraud upon his own account, as well as cases where the bank is not so charged because he is openly acting in his own behalf or in behalf of another, are to be distinguished from cases where, although his conduct was fraudulent, he does act on the bank's behalf as its sole representative in the transaction, and the bank is endeavoring to retain an advantage or to assert a claim founded on the officer's act, for in such case the bank cannot avail itself of the officer's act without being re-

¹²⁷ *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

¹²⁸ *Holm v. Atlas Nat. Bank*, 84 Fed. 119, 28 C. C. A. 297; *Corcoran v. Snow Cattle Co.*, 151 Mass. 74, 23 N. E. 727; *Merchants' Nat. Bank of Gardner v. Clark*, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710; *Commercial Bank of Danville v. Burgwyn*, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

¹²⁹ *Mayor, etc., of New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *National Bank of Commerce of Pierre v. Feeney*, 9 S. D. 550, 70 N. W. 874, 46 L. R. A. 732. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

sponsible for his knowledge.¹³⁰ Thus, where the president of a bank, having embezzled funds of the bank on deposit with its reserve agent, replaced the funds with money borrowed by him on the bank's note, without the directors' knowledge, and the borrowed money was afterwards drawn out to pay the bank's debts, it was held that the bank, having received the benefit of the money through the agency of the president, could not retain it without assuming the burden of the president's knowledge as to how it came to be obtained, and hence was liable to the lender as for money had and received to its use.¹³¹ So, where the maker of a note delivered it unconditionally, and while the condition remained unfulfilled the payee indorsed it to a bank of which he was president and general manager, acting as the sole representative of the bank

¹³⁰ Where the defaulting treasurer of a corporation, whose defalcation is unknown, steals money from a third person and places it with the funds of the corporation in order to conceal and make good his defalcation, without the knowledge of any other officer, the corporation, having used the money as its own, does not thereby acquire good title to it, since it is charged with the knowledge of the treasurer, who was its sole representative in the transaction. "The effect of knowledge," said the court, "is to put the plaintiff in the same position that it would be in if there were no pretense of a consideration moving from it. In order to entitle it to retain the defendant's funds, both elements must exist—a good consideration, and the want of knowledge that the funds belonged to the defendant. Such want of knowledge cannot, in the view of the law, exist, where the party in the particular transaction is represented solely by one who has knowledge. The rule is general that if one assumes to do an act which will be for the benefit of another commits a fraud in so doing, and the person to whose benefit the fraud will inure seeks after knowledge of the fraud to avail himself of that act and to retain the benefit of it, he must be held to adopt the whole act, fraud and all, and to be chargeable with the knowledge of it, so far, at least, as relates to his right to retain the benefit so secured." *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

¹³¹ *Ditty v. Dominion Nat. Bank*, 75 Fed. 769, 22 C. C. A. 376. See, also, *Loring v. Brodie*, 134 Mass. 453; *First Nat. Bank v. Dun-*

in the transaction, it was held that the bank was charged with knowledge, and could not sue on the note until the condition was performed. "It is well settled," said the court, "that an officer or agent, dealing with a corporation or his principal on his own account, is not presumed to communicate knowledge which it would be to his interest to conceal, and the corporation or principal is not chargeable with such knowledge. But there is no room for the application of this principle where the agent is the sole representative of both parties in the transaction."¹³² By some courts this distinction is not recognized.¹³³

bar, 118 Ill. 625, 9 N. E. 186. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

¹³² First Nat. Bank v. Blake (C. C.) 60 Fed. 78. See, also, Niblack v. Cosler (C. C.) 74 Fed. 1000, affirmed 80 Fed. 596, 26 C. C. A. 16; First Nat. Bank of New Milford v. Town of New Milford, 36 Conn. 93; Lowndes v. City Nat. Bank of South Norwalk, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408; Morris v. Georgia Loan, Savings & Banking Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; Fouché v. Merchants' Nat. Bank of Rome, 110 Ga. 827, 36 S. E. 256; Oak Grove & Sierra Verde Cattle Co. v. Foster, 7 N. M. 650, 41 Pac. 522; Holden v. New York & E. Bank, 72 N. Y. 286; Gunster v. Scranton Illuminating Heat & Power Co., 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650; Cook v. American Tubing & Webbing Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193.

"It is true that there is another aspect, which does not seem less probable, and that is that McNeil, in the first instance, exchanged the bank's money for the notes himself. In that view, as it was through McNeil's hand that the bank became possessed of the notes, it would be much more difficult to maintain that the bank was not chargeable with his knowledge, or that an innocent ratification could change the character of the original transaction. Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 17 N. E. 496 [9 Am. St. Rep. 698]." Per Holmes, J., in Corcoran v. Snow Cattle Co., 151 Mass. 74, 23 N. E. 727. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

¹³³ See Bank of Overton v. Thompson, 118 Fed. 798, 56 C. C. A. 554; First Nat. Bank v. Northup, 82 Kan. 638, 109 Pac. 672, 33 L. R. A. (N. S.) 733, 136 Am. St. Rep. 119; First Nat. Bank of Nephi v. Foote, 12 Utah, 157, 42 Pac. 205. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 116, 117; *Cent. Dig.* §§ 282-288.

CHAPTER XI

INSOLVENCY

- 87. In General.
- 88. Liquidation—Preferences.
- 89. Deposit after Insolvency.
- 90. Checks and Drafts.
- 91. Set-Off.
- 92. Wrongful Receipts of Deposit—Following Trust Fund—Preference.

IN GENERAL

87. When a bank, from its inability to meet its obligations in the usual course of business, is insolvent, it is its duty to cease from banking operations.

88. **LIQUIDATION—PREFERENCES**—The liquidation of insolvent banking corporations is generally regulated by statutes, which prohibit transfers and payments after an act of insolvency, or in contemplation of insolvency, with a view to the preference of one creditor to another.

Dissolution

A banking corporation, like other private corporations, may be dissolved in various ways, as by expiration of its charter, or by forfeiture of its charter for misuser or nonuser of its powers. A forfeiture takes effect only upon the judgment of a competent court, unless the legislature has provided otherwise. In most states there are statutes prescribing the manner in which the business of dissolved banking corporations may be liquidated and settled, and the rights and equities of the creditors and stockholders may be enforced.¹ No discussion

¹ See Clark, Corp. (2d Ed.) 230-250. See "Banks and Banking," Dec. Dig. (Key No.) §§ 63-72; Cent. Dig. §§ 125-153.

of these matters will be undertaken, except in relation to national banks.²

Insolvency—In General

A bank is insolvent when its assets are insufficient to pay its obligations as they become due in the ordinary course of business.³ It then becomes the duty of the bank to cease from further banking operations and to go into liquidation. When it is not otherwise provided by statute, a bank may make an assignment for the benefit of creditors.⁴ By the federal bankruptcy act, both state and national banks, but not private bankers, are excepted from the class of persons who may be adjudged involuntary bankrupts.⁵ The liquidation of the affairs of banking corporations, voluntary and involuntary, is commonly regulated by statutes, and will not be discussed, except in relation to national banks.⁶

Transfers and Payments Affected by Insolvency—Preferences

It is very generally held that a banking corporation, like an individual, when not forbidden by statute, may lawfully

² Post, p. 422.

³ *Harmanson v. Bain*, Fed. Cas. No. 6,072, 1 Hughes, 188; *Dodge v. Mastin* (C. C.) 17 Fed. 660-665; *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 876, 28 C. C. A. 548; *State v. Caldwell*, 79 Iowa, 432, 44 N. W. 700; *State v. Myers*, 54 Kan. 206, 38 Pac. 296.

Though a bank, when it suspended, had funds on hand to meet the demands against it on that day, in the ordinary course of business, it was insolvent if its property was insufficient to pay all its debts. *Higgins v. Worthington*, 12 App. Div. 361, 42 N. Y. Supp. 737.

A bank is insolvent when, from the uncertainty of being able to realize on its assets in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out of its hands. *Livingstain v. Columbian Banking & Trust Co.*, 81 S. C. 244, 62 S. E. 250, 22 L. R. A. (N. S.) 445. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 73; *Cent. Dig.* § 154.

⁴ See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* § 177.

⁵ Act July 1, 1898, c. 541, § 4, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309).

⁶ Post, pp. 411, 413.

prefer certain creditors.⁷ Many states, however, by statute prohibit transfers and payments by a bank made after an act of insolvency, or in contemplation of insolvency, with a view to a preference.⁸ Such is the provision of the National Bank Act.⁹ These statutes make a transfer or payment void, when there is an intention on the part of the bank to prefer a creditor, although the creditor receiving the transfer or payment is without knowledge or suspicion of the insolvency.¹⁰

A payment is not necessarily invalid, however, because made after the bank's insolvency, or even after its managers become aware of its insolvency. So long as it is a going concern, carrying on its business as usual, and has committed no act of insolvency, and a present suspension of business is not contemplated, although the bank is actually insolvent, a payment to a depositor or other creditor in the usual course of business is not made in contemplation of insolvency or with a view to a preference under the statute.¹¹ It is otherwise

⁷ *Catlin v. Eagle Bank of New Haven*, 6 Conn. 233. See *Merced Nat. Bank v. Ivett*, 127 Cal. 134, 59 Pac. 393. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 74; *Cent. Dig.* §§ 156, 179.

⁸ See *Robinson v. Aird*, 43 Fla. 30, 29 South. 633; *Brighton v. White*, 128 Ind. 320, 27 N. E. 620; *Bradner v. Woodruff*, 52 Hun, 214, 5 N. Y. Supp. 207. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 74; *Cent. Dig.* § 156.

⁹ Post, p. 421.

¹⁰ *National Security Bank v. Butler*, 129 U. S. 223, 9 Sup. Ct. 281, 32 L. Ed. 682; *Case v. Citizens' Bank of Louisiana*, Fed. Cas. No. 2,489, 2 Woods, 23. See, also, *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 28 C. C. A. 548.

Some statutes except from their operation purchases for value without notice of the insolvency. See *Hill v. Western & A. R. Co.*, 86 Ga. 284, 12 S. E. 635; *Clarke v. Ingram*, 107 Ga. 565, 33 S. E. 802. See, also, *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168, 21 N. E. 178. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 74; *Cent. Dig.* § 156.

¹¹ *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 19 Sup. Ct. 787, 43 L. Ed. 1106, affirming *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 28 C. C. A. 548; *Dutcher v. Importers' & Traders' Nat. Bank*,

if the payment is not made in the usual course of business, although the payee is ignorant of the insolvency.¹² Thus, a payment to a depositor during a "run" on the bank, while the bank, although actually insolvent, is continuing in business and making payments in usual course, in the expectation that if it can continue in business it will be able to meet all its obligations, has been held not to be a preference.¹³

While the disposition by a bank of its assets, when insolvent or in contemplation of insolvency, with a view to a preference, is forbidden, liens, equities, and rights arising prior to

59 N. Y. 5 (cf. *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168, 21 N. E. 178); *Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855; post, p. 423.

A director in a bank, being also the president of defendant corporation, informed it of the impending insolvency of the bank, whereon it drew its check for its balance on deposit in the bank, which was signed by its president, and the full amount of the deposit was secured on the same day that the bank closed. Held, that the transaction was not void, as a violation of a statute prohibiting an insolvent corporation, or any of its officers, from converting its property to its members for other consideration than full value in cash, and from making any assignment preferring creditors, since there was nothing in such provision to prevent a depositing corporation from withdrawing its money on information received by its president, as director, of the bank's insolvency. *O'Brien v. East River Bridge Co.*, 161 N. Y. 539, 56 N. E. 74, 48 L. R. A. 122. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 74; Cent. Dig. § 156*.

¹² *James Clark Co. v. Colton*, 91 Md. 195, 46 Atl. 386, 49 L. R. A. 698. But see *McAfee v. Bland* (Ky.) 11 S. W. 439. Under some statutes, although the payment was not in due course, if the payee was ignorant of the insolvency and of the intent to prefer, he is protected. *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 74; Cent. Dig. § 156*.

¹³ *Stone v. Jenison*, 111 Mich. 592, 70 N. W. 149, 36 L. R. A. 675; *Livingstain v. Columbian Banking & Trust Co.*, 81 S. C. 244, 62 S. E. 249, 22 L. R. A. (N. S.) 445. See, also, *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185. See "*Banks and Banking*," *Dec. Dig. (Key No.) § 74; Cent. Dig. § 156*.

and not in contemplation of insolvency are not invalidated.¹⁴ The prohibition is against giving a preference, and not against giving security when a debt is created for a loan made at the time, and in such case the creditor can retain the security until the debt is paid, though the bank was insolvent to the knowledge of the creditor.¹⁵ But the giving of security for an antecedent debt, under such circumstances, is invalid as a preference.¹⁶

DEPOSIT AFTER INSOLVENCY

89. The reception of a deposit by a bank with knowledge on its part that it is hopelessly insolvent is fraudulent, and the bank thereby becomes a constructive trustee of the deposit, and the depositor may recover the deposit, if it can be identified in the hands of a receiver or an assignee for the benefit of creditors of the insolvent bank.

The relation between a bank and its depositor being merely that of debtor and creditor, the depositor is entitled to no preference upon the bank's insolvency, but must come in with the other general creditors.¹⁷ For a bank to receive deposits with

¹⁴ *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; post, p. 423. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 74, 286; *Cent. Dig.* §§ 156, 1111.

¹⁵ See *Harris v. Randolph County Bank*, 157 Ind. 120, 60 N. E. 1025.

Where a bank executed its note to a clearing house association in return for certificates and deposited collateral, no preference was created. *Booth v. Atlanta Clearing-House Ass'n*, 132 Ga. 100, 63 S. E. 907. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 74; *Cent. Dig.* § 156.

¹⁶ *Burrell v. Bennett*, 20 Wash. 644, 56 Pac. 375; post, p. 423. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 74; *Cent. Dig.* § 156.

¹⁷ *Bayor v. American Trust & Savings Bank*, 157 Ill. 62, 41 N. E. 622; *Bank of Blackwell v. Dean*, 9 Okl. 626, 60 Pac. 226; *In re Franklin Bank*, 1 Paige (N. Y.) 249, 19 Am. Dec. 413; ante, p. 12. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* § 157.

knowledge of the hopeless insolvency, however, is fraudulent, and in such case the depositor may rescind the transaction and recover back his deposit from the bank, which becomes a constructive trustee ex maleficio, and holds the deposit for the use of the depositor.¹⁸ "A banker, who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business, and receive the money of his customers, and, although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act; i. e., to cheat and defraud all persons whose money he receives and whom he fails to pay when he is compelled to stop business."¹⁹ Since the depositor's right of recovery is based on fraud, there can be no recovery, although the bank was insolvent, unless it appears that the insolvency was known to its officers.²⁰ It has been held that the mere fact that the bank was in an embarrassed condition is not enough to prove fraud.²¹ "The insolvency must be of such a character that it was manifestly impossible for the bankers to continue in business and to meet their obligations, and the fact must have

¹⁸ *St. Louis & S. F. Ry. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683; *City of Somerville v. Beal* (C. C.) 49 Fed. 790; *Wasson v. Hawkins* (C. C.) 59 Fed. 233; *Richardson v. New Orleans Debenture Redemption Co.*, 102 Fed. 781, 42 C. C. A. 619, 52 L. R. A. 67; *First Nat. Bank v. Strauss*, 66 Miss. 479, 6 South. 232, 14 Am. St. Rep. 579; *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; *Orme v. Baker*, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 968. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* § 157.

¹⁹ *Anonymous*, 67 N. Y. 598. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* § 157.

²⁰ *Furber v. Dane*, 204 Mass. 412, 90 N. E. 859, 27 L. R. A. (N. S.) 808; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407; *New York Breweries Co. v. Higgins*, 79 Hun, 250, 29 N. Y. Supp. 416. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* § 157.

²¹ *Quin v. Earle* (C. C.) 95 Fed. 728. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* § 157.

been known to the bankers, so as to justify the conclusion that the bankers accepted the depositor's money knowing that they would not and could not respond when the depositor demanded it." ²²

If the deposit is in the form of money which has not been mingled with the bank's funds, the depositor can maintain replevin for it; ²³ and so, when the deposit is in the form of a check or other paper, so long as it remains in the hands of the bank or receiver. ²⁴ If the deposit is in the form of money, which has been mingled with the bank's funds, the depositor may recover the fund, if it can be identified. ²⁵ The right to reclaim the paper or the money in such cases is not precluded by the provisions forbidding preferential transfers and payments, and requiring ratable distribution of the assets among the creditors, since the plaintiff does not claim under a transfer from the bank, but under his original title; that is, he is not seeking to enforce a right as creditor of the bank, but to reclaim his own property obtained by fraud, and while the right may be defeated by the acts or acquiescence of the defrauded party, or because his property has lost its identity and cannot be traced, or because others have innocently ac-

²² *Williams v. Van Norden Trust Co.*, 104 App. Div. 251, 93 N. Y. Supp. 821. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 75; *Cent. Dig.* § 157.

²³ *Furber v. Stephens* (C. C.) 35 Fed. 17. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 75; *Cent. Dig.* § 157.

²⁴ *Richardson v. Denegre*, 93 Fed. 572, 35 C. C. A. 452; *American Trust & Sav. Bank v. Gunder & Paeschke Mfg. Co.*, 150 Ill. 336, 37 N. E. 227. See, also, *Showalter v. Cox*, 97 Tenn. 547, 37 S. W. 286; *Bruner v. First Nat. Bank*, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532; *Hyland v. Roe*, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

The depositor may recover it from one to whom it has passed who is not a holder in due course. *Spring Brook Chemical Co. v. Dunn*, 39 App. Div. 130, 57 N. Y. Supp. 100. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 75; *Cent. Dig.* § 157.

²⁵ *Post*, p. 354.

quired interests in ignorance of the fraud, the other creditors have no equity to have the plaintiff's property applied in payment of the obligations of the bank.²⁶

CHECKS AND DRAFTS

90. The holder of a check or draft issued by a bank has no right upon its insolvency to a preference over the general creditors.

Since a check does not operate as an assignment of any part of the funds to the credit of the drawer with the drawee, a check given by a bank confers upon the payee no right, upon the drawer's insolvency, to a preference over its general creditors.²⁷ Of course, upon the insolvency of the drawee, the holder of the check, having no rights as against the drawee, has no right to a preference over its general creditors.²⁸ The certification of a check creates no trust in favor of the holder, and gives no lien on any portion of the assets.²⁹

²⁶ *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9. See, also, *Richardson v. Oliver*, 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113; *Importers' & Traders' Nat. Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Harris v. First Nat. Bank of Johnson City* (Tenn.) 41 S. W. 1084. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* §§ 157, 1116.

²⁷ *Jewett v. Yardley* (C. C.) 81 Fed. 920; *Clark v. Toronto Bank*, 72 Kan. 1, 82 Pac. 582, 2 L. R. A. (N. S.) 83, 115 Am. St. Rep. 173; *Grammel v. Carmer*, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363. See, also, *Citizens' Nat. Bank v. Dowd* (C. C.) 35 Fed. 340. But see *Livingstain v. Columbian Banking & Trust Co.*, 81 S. C. 244, 62 S. E. 249, 22 L. R. A. (N. S.) 445; ante, p. 127. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* § 192.

²⁸ *Harrison v. Wright*, 100 Ind. 515, 58 Am. Rep. 805. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* § 192.

²⁹ *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* § 192.

SET-OFF

91. A debtor of an insolvent bank may set off against his indebtedness a debt due him from the bank.

As already shown, a depositor has a right to set off a general deposit against his matured debt to the bank, and, upon its insolvency, may exercise this right, even if the debt did not mature until after the insolvency.³⁰ And in general, in an action by the receiver or assignee of an insolvent bank against a debtor, he may set off against his indebtedness a debt due him from the bank at the time of the insolvency,³¹ even though such debt had not been matured;³² but he may not set off a claim against the bank which he has acquired subsequently.³³ The right of a bank, or of its receiver or assignee, to apply a deposit to the payment of the depositor's debt to the bank, has been already considered.³⁴

³⁰ Ante, p. 73.

³¹ *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 289; *Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351; *Salladin v. Mitchell*, 42 Neb. 859, 61 N. W. 127; *Jackson v. Receivers of People's Bank of Patterson*, 9 N. J. Eq. 205; *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; *Armstrong v. Warner*, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; *Farmers' Deposit Nat. Bank v. Penn Bank*, 123 Pa. 283, 16 Atl. 761, 2 L. R. A. 273.

Where, on the insolvency of a bank, the lessor of its banking house was indebted to it on a demand note, he was not entitled to set off a claim for damages for breach of the lease by the bank against its claim on the note. *McGraw v. Union Trust Co.*, 135 Mich. 609, 98 N. W. 390. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig. §§ 375-379*.

³² *Steelman v. Atchley* (Ark.) 135 S. W. 902, 32 L. R. A. (N. S.) 1060; *Citizens' Bank of Greenville v. Kretschmar*, 91 Miss. 608, 44 South. 930; *In re Receiver of Middle District Bank*, 1 Paige (N. Y.) 585, 19 Am. Dec. 452; *Smith v. Mosby*, 9 Heisk. (Tenn.) 501; post, p. 424. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig. §§ 375-379*.

³³ *Dyer v. Sebrell*, 135 Cal. 597, 67 Pac. 1036; *Colt v. Brown*, 12 Gray (Mass.) 233. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig. §§ 375-379*.

³⁴ Ante, p. 61.

WRONGFUL RECEIPT OF DEPOSIT—FOLLOWING TRUST FUND—PREFERENCE

92. Where a bank receives a deposit knowing that it has no right to receive it, so that it becomes a constructive trustee of the deposit, the depositor is entitled to recover the deposit, in preference to the general creditors, if he can trace it and identify it, in the hands of the receiver or assignee for the benefit of creditors of the insolvent bank, either specifically, or in the form of other specific property into which it has been converted, or as forming part of a fund for distribution among the creditors, which is larger than it would have been but for the bank's misappropriation. Unless the depositor can so trace and identify the deposit, by weight of authority, he can only come in with the general creditors; but some courts hold that the depositor is entitled to a preference if he can show that the bank received the benefit of the deposit, although he fails so to trace and identify it.

Although the relation between a bank and its depositor is ordinarily that of debtor and creditor, in certain cases, where a bank receives a deposit knowing that it has no right to receive it, it holds the money deposited as a constructive trustee as where it receives the deposit with knowledge of its insolvency,⁸⁵ or with knowledge that the deposit is made in violation of a trust.⁸⁶ In such cases the question arises, upon the bank's insolvency, whether the depositor or other person entitled to enforce the trust must come in with the general creditors or is entitled to a preference.

If the deposit is of money which has been mingled with the bank's funds, or of paper the proceeds of which has been collected and so mingled, the depositor could, of course, re-

⁸⁵ Ante, p. 349.

⁸⁶ Ante, p. 44.

claim the money if he could identify the particular coins or bank notes which had come into the fund; and if his money or property had been used to buy other property, his equity would attach to that property in the hands of the receiver or assignee. Usually this is impossible, because the money of the depositor has been mixed with the bank's funds and the identity of the particular coins or notes has been lost. Nevertheless it is held to-day that the confusion does not destroy the equity entirely. "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."³⁷ If, therefore, it can be shown that the money deposited or collected was in the bank when it stopped business, so that it constitutes a part of the common mass in the hands of the receiver or assignee, although it may not be possible to ascertain the identical coins or notes, the identification of the money as part of the common mass is sufficient, and the depositor may take out of the common mass as much as he put in, or, in other words, he is entitled to a preference over the other creditors.³⁸

³⁷ *Frelinghuysen v. Nugent* (C. C.) 36 Fed. 229. See, also, *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* § 157.

³⁸ *Wasson v. Hawkins* (C. C.) 59 Fed. 233; *Lake Erie & W. R. Co. v. Indianapolis Nat. Bank* (C. C.) 65 Fed. 691; *Quin v. Earle* (C. C.) 95 Fed. 728.

If collected by the receiver, the depositor may recover the pro-

This state of affairs arises where the deposit is received immediately before the bank closes its doors, so that the identical money is among the assets turned over to the receiver. It may be, however, that the bank continues to do business for a time before it goes into the hands of the receiver, and in the meantime continues to receive and pay out money. In this case it is generally held that the right of the depositor to be paid in preference to the general creditors depends upon the amount of money continuously in the bank from the time of the bank's wrongful receipt of the deposit.³⁹ When the money of the depositor is mixed with the other money of the bank, he becomes cestui que trust of that proportion of all the money in the bank which the amount of his deposit bears to the total amount, or he may claim a lien to the amount of all his deposit upon all the money in the bank, so that, if the total amount in the bank remains continuously equal to or more

ceeds from him. *Richardson v. Olivier*, 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* §§ 189-191.

³⁹ *Massey v. Fisher* (C. C.) 62 Fed. 958; *Boone County Nat. Bank v. Latimer* (C. C.) 67 Fed. 27; *Richardson v. New Orleans Debenture Redemption Co.*, 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67; *Richardson v. New Orleans Coffee Co.*, 102 Fed. 785, 43 C. C. A. 583; *In re Swift* (D. C.) 108 Fed. 212, 215; *Sherwood v. Central Michigan Sav. Bank*, 103 Mich. 109, 61 N. W. 352; *Wallace v. Stone*, 107 Mich. 190, 65 N. W. 113; *Board of Fire & Water Com'rs of City of Marquette v. Wilkinson*, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; *In re Holmes*, 37 App. Div. 15, 55 N. Y. Supp. 708, affirmed 159 N. Y. 532, 53 N. E. 1126; *Blair v. Hill*, 50 App. Div. 33, 63 N. Y. Supp. 670; *Orme v. Baker*, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 968; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; *State v. Foster*, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47. See, also, *Cleveland, C., C. & St. L. Ry. v. Hawkins* (C. C.) 79 Fed. 29; *Merchants' Nat. Bank v. School Dist. No. 8*, 94 Fed. 705, 36 C. C. A. 432; *Western German Bank v. Norvell*, 134 Fed. 724, 69 C. C. A. 330; *Butler v. Western German Bank*, 159 Fed. 116, 86 C. C. A. 306; *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385; *Bishop v. Mahoney*, 70 Minn. 238, 73 N. W. 6; *City of Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; *Willoughby*

than the amount of his deposit, he must be paid in full, while if at any time the total amount falls below the amount of his deposit his security is reduced pro tanto, and will not be increased by subsequent deposits in the bank.⁴⁰ The rule is the same as that applied where a trustee has mingled in one bank deposit the trust money and money of his own, in which case the cestui que trust may hold the depositor as a trustee of the deposit pro tanto, so that, if the deposit remains continuously equal to the portion thereof to which the cestui is equitably entitled, he may enforce a charge upon the depositor's claim against the bank, as against the general creditors of the insolvent trustee, to that amount, while if the deposit falls below that amount the security of the cestui is reduced pro tanto,⁴¹ and will not be increased by a subsequent deposit by the trustee of his own money.⁴² The rule is often said to be based on a presumption that the trustee first drew his own money out of the mixed fund, leaving the trust fund in the balance on hand; but this is, as has been pointed out, a pure fiction, the true explanation doubtless being that the cestui has an option to claim either his proportion of the fund, or a charge upon the whole to the amount of the money originally held in trust for him.⁴³

v. Weinberger, 15 Okl. 226, 79 Pac. 777; Plano Mfg. Co. v. Auld, 14 S. D. 512, 89 N. W. 21, 86 Am. St. Rep. 769. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* §§ 184-196.

⁴⁰ See 19 Harv. Law Rev. 511, 520, "Following Misappropriated Property and Its Product," by James Barr Ames.

⁴¹ In re Hallett, 13 Ch. D. 696; Spokane County v. First Nat. Bank, 68 Fed. 979, 981, 16 C. C. A. 81; In re Swift (D. C.) 108 Fed. 212; In re Mulligan (D. C.) 116 Fed. 715, 717; Greene's Estate (Sur.) 20 N. Y. Supp. 94. See, also, Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861, Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 946; Importers' & Traders' Nat. Bank v. Peters, 123 N. Y. 272, 25 N. E. 319. See "*Trusts*," *Dec. Dig. (Key No.)* §§ 356-358; *Cent. Dig.* §§ 529-538.

⁴² Mercantile Trust Co. v. St. Louis & S. F. Ry. Co. (C. C.) 99 Fed. 485; Cole v. Cole, 54 App. Div. 37, 66 N. Y. Supp. 314. See "*Trusts*," *Dec. Dig. (Key No.)* §§ 356-358; *Cent. Dig.* §§ 529-558.

⁴³ 19 Harv. Law Rev. 511, 518.

In the cases referred to in the preceding paragraph, the depositor is entitled to a preference over the other creditors, because his money is traceable into the fund which is in the receiver's hands for distribution among the general creditors, and which is consequently larger than it would have been but for the bank's misappropriation of the depositor's money. The right to follow the trust moneys into other property has its basis in the right of property, not upon any theory of preference by reason of an unlawful conversion. If the money is not traceable into such fund, or into specific property, which is in the hands of the receiver, the depositor must come in with the general creditors. If the trust fund has been dissipated by the trustee, and is neither specifically in the hands of the receiver or assignee, nor represented by other property into which it has been converted, there can be no preference. Such is the rule which prevails in nearly all jurisdictions.⁴⁴

⁴⁴ *Multnomah County v. Oregon Nat. Bank* (C. C.) 61 Fed. 912 (disapproving *Sandiego County v. California Nat. Bank* (C. C.) 52 Fed. 59); *City Bank of Hopkinsville v. Blackmore*, 75 Fed. 771, 21 C. C. A. 514; *Beard v. Independent Dist. of Pella City*, 88 Fed. 375, 31 C. C. A. 562; *St. Louis Brewing Ass'n v. Austin*, 100 Ala. 313, 13 South. 908; *Hill v. Miles*, 83 Ark. 486, 104 S. W. 198; *Lanterman v. Travous*, 174 Ill. 459, 51 N. E. 805; *New Farmers' Bank's Trustee v. Cockrell*, 106 Ky. 578, 51 S. W. 2; *Italian Fruit & Importing Co. v. Penniman*, 100 Md. 698, 61 Atl. 694, 1 L. R. A. (N. S.) 252; *Sunderlin v. Mecosta County Sav. Bank*, 116 Mich. 281, 74 N. W. 478; *Board of Fire & Water Com'rs of City of Marquette v. Wilkinson*, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357, 81 N. W. 20; *Shields v. Thomas*, 71 Miss. 260, 14 South. 84, 42 Am. St. Rep. 458; *City of Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885 (overruling earlier cases); *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168, 21 N. E. 178; *Willoughby v. Weinberger*, 15 Okl. 226, 79 Pac. 777; *Freiberg v. Stoddard*, 161 Pa. 259, 28 Atl. 1111; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383 (overruling *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287, and other cases); *Thuemmler v. Barth*, 89 Wis. 381, 62 N. W. 94; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96; *Dowie v. Humphrey*, 91 Wis. 98, 64 N. W. 315; *State*

In a few jurisdictions it has been held that it is not necessary to trace the trust money into the hands of the receiver or assignee, or to prove that the fund for distribution among the creditors is larger than it would have been but for the bank's misappropriation, and that it is enough to show that the money went into the estate of the bank; but even in these jurisdictions the tendency of many of the later decisions has been to qualify or to overrule this doctrine.⁴⁵

v. Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47; Blake v. State Sav. Bank, 12 Wash. 619, 41 Pac. 909.

Where one deposits in a bank the check of another depositor, and is given credit, the assets of the bank are not thereby increased, and hence there can be no tracing and reclaiming of the deposit on the bank's insolvency. Perth Amboy Gaslight Co. v. Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704. See "*Trusts*," *Dec. Dig. (Key No.)* §§ 356-358; *Cent. Dig.* §§ 529-550.

⁴⁵ First Nat. Bank of Central City v. Hummell, 14 Colo. 259, 23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257; Independent District of Boyer v. King, 80 Iowa, 497, 45 N. W. 908; Davenport Plow Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442 (but see District Tp. of Eureka v. Farmers' Bank of Fontanelle, 88 Iowa, 194, 55 N. W. 342; Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472; Sioux City Stockyards Co. v. Fribourg, 121 Iowa, 230, 96 N. W. 747; Whitcomb v. Carpenter, 134 Iowa, 227, 111 N. W. 825, 10 L. R. A. [N. S.] 928; Hanson v. Roush, 139 Iowa, 58, 116 N. W. 1061; Stilson v. First State Bank of Corwith, 149 Iowa, 662, 129 N. W. 70); Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Reeves v. Pierce, 64 Kan. 502, 67 Pac. 1108 (cf. Myers v. Board of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263); Harrison v. Smith, 83 Mo. 210, 53 Am. Rep. 571; Stoller v. Coates, 88 Mo. 514; Tierman's Ex'r v. Security Building & Loan Ass'n, 152 Mo. 135, 53 S. W. 1072 (but see Bircher v. Walther, 163 Mo. 461, 63 S. W. 691); State v. State Bank of Wahoo, 42 Neb. 896, 61 N. W. 252; State v. Midland State Bank, 52 Neb. 1, 71 N. W. 1011, 66 Am. St. Rep. 484; (but see City of Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885). See, also, Shopert v. Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* §§ 157, 1116.

CHAPTER XII

NATIONAL BANKS

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IN GENERAL

93. National banking associations are corporations formed under the provisions of the National Bank Act. They are governmental instruments, and the states can exercise no control over them, except so far as Congress may permit; but, in general, their contracts, their rights of property, and their right to collect and their liability to be sued for their debts are governed by the state laws.

Scope of Chapter

Many questions relating to national banks, as well as many of the provisions of the National Bank Act, are dealt

with in other chapters. In this chapter it is proposed to take up such of the remaining provisions of the act and matters relating to national banks as are deemed to be within the scope of the book.

National Banks—In General

While the federal constitution does not expressly grant to Congress the power to create corporations, it grants the power by implication, as declared by Chief Justice Marshall, whenever the creation of a corporation is an appropriate measure to execute the powers conferred, and under this implied grant Congress has power to incorporate a bank.¹ Under this power Congress has enacted the act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," to be known as the National Bank Act.² The constitutionality of the act "rests upon the same principle as the act creating the second Bank of the United States. * * * The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree and necessity which existed for creating them Congress is the sole judge."³ It has been pointed out that the act may fall within the power of Congress to borrow money, to regulate interstate commerce, or to coin money and to regulate the value thereof.⁴

The national banking system owes its existence to the Civil

¹ *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* § 879.

² See Rev. St. U. S. § 5133 (Act June 20, 1874, c. 343, § 1, 18 Stat. 123 [U. S. Comp. St. 1901, p. 3454]).

³ *Farmers' & Mechanics' Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* §§ 879-888.

⁴ *Thompson, Corp.* (2d Ed.) § 126.

National banks "were established for the purpose, in part, of providing a currency for the whole country, and in part to create a mar-

War and to the necessity of finding a market for United States bonds. The first act providing for a system of national banks was passed February 25, 1863; but it proved unsatisfactory, and the act of June 3, 1864, making important changes, was substituted, under which banks chartered by the states could be reorganized as national banks. The reorganization of state banks was stimulated by an act laying a tax of 10 per cent. on all bank notes of state banks and others paid out by them after July 1, 1866.⁵ The right of Congress to restrain the circulation of any notes not issued under its own authority was sustained upon the ground that Congress, having undertaken, in the exercise of constitutional power, to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation.⁶

Power of States

The national banks having been brought into existence by Congress as governmental institutions, the states can exercise no control over them, nor in any way affect their operation, except so far as Congress may see proper to permit.⁷ As we

ket for the loans of the general government." *Tiffany v. National Bank of Missouri*, 18 Wall. 409, 21 L. Ed. 862.

As to the power of Congress to provide a currency for the country, see *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* §§ 879-888.

⁵Rev. St. U. S. § 3412. This is superseded by Act Feb. 8, 1875, c. 36, 18 Stat. 311 (U. S. Comp. St. 1901, p. 2249).

For a history of the legislation, see *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482; Dunbar, *Theory & Hist. of Banking*, 132 et seq.

⁶*Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* §§ 879-888.

⁷*Farmers' & Mechanics' Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196. See, also, *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700.

The bank depositors' guaranty act of Kansas, which authorizes banks incorporated under the laws of the state and possessing prescribed qualifications to join in contributing to and maintaining a fund for securing certain classes of their depositors against loss in

have seen, the provisions of the act relating to interest chargeable by the banks supersede the state laws on the subject of usury.⁸ So a state law attempting to prohibit national banks from receiving deposits when insolvent and prescribing a penalty is invalid as an attempt to control and regulate the powers of national banks.⁹ "Undoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction."¹⁰ So, likewise, it may declare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its own banks or institutions. But it is without lawful power to make such special acts applicable to banks organized and operating under the laws of the United States."¹¹

Of course, national banks are not wholly withdrawn from the operation of state legislation. "They are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their

case of the insolvency of any of their number, is not unconstitutional as denying to the national banks within the state the equal protection of the law. Nor is such act unconstitutional on the ground that its effect may be to attract depositors from the national to the guaranteed banks, and thus increase competition with the national banks, and impair their efficiency as instrumentalities of the national government. *Dolley v. Abilene Nat. Bank of Abilene, Kan.*, 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065. See, also, *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062; *Schallenberger v. First State Bank of Holstein, Neb.*, 219 U. S. 114, 31 Sup. Ct. 189, 55 L. Ed. 117. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* § 880.

⁸ Ante, p. 239.

⁹ *Easton v. Iowa*, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* § 880.

¹⁰ See *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287; *State v. First Nat. Bank*, 2 S. D. 568, 51 N. W. 587. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* § 880.

¹¹ *Easton v. Iowa*, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* § 880.

contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."¹² Thus a state statute requiring the cashiers of national banks, under penalty, to transmit to the clerks of the towns in which shareholders may reside a list of such stockholders, is valid.¹³ It has been held that it is not competent for state legislation to limit or interfere with the transferable quality of national bank stock, as left by the federal statutes.¹⁴

FORMATION

94. A national banking association may be formed by any number of persons, not less than five, who shall enter into articles of association, make an organization certificate, and comply with the other formalities prescribed. A state bank may become a national banking association by complying with the requirements of the act, without loss of its identity.

In General

The National Bank Act provides that associations for carrying on the business of banking may be formed by any number

¹² First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. Ed. 701. See, also, McClellan v. Chipman, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461; Merchants' Nat. Bank v. Ford, 124 Ky. 403, 99 S. W. 260; Hawley v. Hurd, 72 Vt. 122, 47 Atl. 407, 52 L. R. A. 195, 82 Am. St. Rep. 922. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* § 880.

¹³ Waite v. Dowley, 94 U. S. 527, 24 L. Ed. 181; post, p. 435. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* § 880.

¹⁴ Doty v. First Nat. Bank, 3 N. D. 9, 53 N. W. 77, 17 L. R. A. 259. See, also, Scott v. Pequonnock Nat. Bank, 15 Fed. 494; Braden's Estate, 165 Pa. 184, 30 Atl. 746. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 233; *Cent. Dig.* § 880.

of natural persons, not less than five, who shall enter into articles of association and make an organization certificate, in form as prescribed, both of which shall be forwarded to the comptroller of the currency, who shall preserve them in his office.¹⁵ The association thereupon becomes a body corporate with the powers enumerated, but it is not authorized to transact any business, except such as is incidental and preliminary to its organization, until it has been authorized by the comptroller to begin the business of banking.¹⁶ At least 50 per cent. of the capital stock must be paid in before the association may be authorized to commence business.¹⁷ When the certificate is transmitted, the comptroller is required to ascertain whether the association has complied with the requirements of the act, and upon being satisfied thereof shall issue a certificate that the association has so complied and is authorized to commence the business of banking, and the association shall cause the certificate to be published.¹⁸ The comptroller has jurisdiction to determine as to the completeness of the organization, and his certificate is not open to collateral attack, and is conclusive for purposes of litigation.¹⁹

¹⁵ Rev. St. U. S. §§ 5133-5135 (U. S. Comp. St. 1901, pp. 3454, 3455). For change of name or location, see Act May 1, 1886, c. 73, §§ 2-4, 24 Stat. 18 (U. S. Comp. St. 1901, p. 3456); ante, p. 270.

¹⁶ Rev. St. U. S. § 5136 (U. S. Comp. St. 1901, p. 3455).

A lease by a bank, before receiving such authorization, of a bank building, is ultra vires, and will not support an action for rent, or for anything beyond the value of what the bank actually received and enjoyed. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 259; *Cent. Dig.* §§ 884, 996.

¹⁷ Rev. St. U. S. § 5140 (U. S. Comp. St. 1901, p. 3461).

¹⁸ Rev. St. U. S. §§ 5168-5170 (U. S. Comp. St. 1901, p. 3474).

¹⁹ *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168. See, also, *Mix v. National Bank of Bloomington*, 91 Ill. 20, 33 Am. Rep. 44; *Washington County Nat. Bank v. Lee*, 112 Mass. 521; *Citizens' Nat. Bank v. Great Western Elevator Co.*, 13 S. D. 1, 82 N. W. 186; *National Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35.

A certificate under the seal of the office of the comptroller, given

Organization of State Banks as National Banks

Any state bank, whether incorporated under a special or a general law, may become a national association, in the manner prescribed by the National Bank Act. In such case the articles of association and the organization certificate may be executed by a majority of the directors, who thereafter may do whatever is necessary to perfect the organization, and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the change. The shares may continue for the same amount as before, and the directors may continue to be such until others are elected or appointed. When the comptroller has issued a certificate that the provisions of law have been complied with and that the association is authorized to commence the business of banking, its organization as a national bank is complete.²⁰

No authority from the state is necessary to enable a state bank to become a national bank.²¹ The change of a state bank into a national bank "does not destroy its identity or corporate existence, but simply results in a continuation of the same body, with the same officers and stockholders, the same property, assets, and banking business, under a changed jurisdiction."²² The obligations of the old bank continue binding

by a deputy as "acting" comptroller, is sufficient. *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 236; *Cent. Dig.* §§ 888-892.

²⁰ Rev. St. U. S. § 5154 (U. S. Comp. St. 1901, p. 3466).

The comptroller's certificate is conclusive. *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168.

A savings bank organized in the District of Columbia may become a national bank. *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 237; *Cent. Dig.* §§ 894-897.

²¹ *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168. Cf. *State v. National Bank of Baltimore*, 33 Md. 75; *Thomas v. President, etc., of Farmers' Bank of Maryland*, 46 Md. 43. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 237; *Cent. Dig.* §§ 894-897.

²² *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 12 Sup. Ct. 60, 35 L. Ed. 841. See, also, *City Nat. Bank of Poughkeepsie v.*

upon the new,²³ and the new bank succeeds to the right to enforce all demands existing in favor of the old.²⁴ Conversely, state statutes sometimes make provision for the organization of national banks into state banks; the state bank retaining the identity of the national bank, and succeeding to its assets and liabilities.²⁵

Continuance and Extension of Corporate Existence

A national bank, upon its due organization, has succession for 20 years, unless it is sooner dissolved according to the provisions of its articles, or by the act of the shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.²⁶

A later act²⁷ provides that any association, within the two

Phelps, 97 N. Y. 44, 49 Am. Rep. 513; *People's Nat. Bank v. Board of Com'rs of Kingfisher County (Okla.)* 103 Pac. 682. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 237; *Cent. Dig.* §§ 894-897.

²³ *Coffey v. National Bank of Missouri*, 46 Mo. 140, 2 Am. Rep. 488; *Kelsey v. National Bank of Crawford County*, 69 Pa. 426.

The conversion of a state bank into a national bank is not a "closing of its business," within the meaning of the New York statute of 1859 (Laws 1859, c. 236), providing for the redemption of a state bank's circulation, and releasing it from liability on such notes as are not presented within six years after the giving of the prescribed notice, and any notes not so presented constitute a valid claim against the national bank. *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 12 Sup. Ct. 60, 35 L. Ed. 841. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 237; *Cent. Dig.* §§ 894-897.

²⁴ *Atlantic Nat. Bank v. Harris*, 118 Mass. 147. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 237; *Cent. Dig.* §§ 894-897.

²⁵ *First Commercial Bank of Pontiac v. Talbert*, 103 Mich. 625, 61 N. W. 888, 50 Am. St. Rep. 385. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 232; *Cent. Dig.* § 1080.

²⁶ Rev. St. U. S. § 5136 (U. S. Comp. St. 1901, p. 3455); post, p. 410 et seq.

²⁷ Act July 12, 1882, c. 290, 22 Stat. 162 (U. S. Comp. St. 1901, p. 3457). See, also, Act April 12, 1902, c. 503, 32 Stat. 102 (U. S. Comp. St. Supp. 1909, p. 1318).

As to presumption of acceptance of benefit of certificate of controller extending corporate existence. *Clement v. United States*, 149 Fed. 305, 79 C. C. A. 243. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 236; *Cent. Dig.* §§ 888, 889.

years next previous to the date of the expiration of its corporate existence, with the consent of stockholders owning not less than two-thirds of the capital stock, and with the approval of the comptroller of the currency, may extend its period of succession by amending its articles for a term of not more than twenty years. A shareholder not assenting may withdraw from the association and may receive the appraised value of his shares.²⁸ The association continues to be the identical association, with the same rights and liabilities.²⁹ Associations whose corporate existence has expired or is about to expire, and which do not desire to extend their existence must take the steps required of an association whose shareholders vote to go into liquidation, and the franchises of such association are extended, for the sole purpose of liquidating their affairs, until such affairs are finally closed.³⁰

CAPITAL STOCK—AMOUNT

95. The amount of the capital stock must be stated in the articles, and may not be less than the amount which the act prescribes and which varies according to the population of the place in which the bank is organized. The capital may be increased or decreased, and any impairment thereof must be made good, in the manner prescribed by the act.

²⁸ A shareholder ceases to be such on giving notice of his withdrawal within the required time. *Kimball v. Apsey*, 164 Fed. 830, 90 C. C. A. 634. See, also, *Aspey v. Whittemore*, 199 Mass. 65, 85 N. E. 91. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 248, 285; *Cent. Dig.* § 915.

²⁹ See *People v. Backus*, 117 N. Y. 196, 22 N. E. 759. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 236; *Cent. Dig.* §§ 888-892.

³⁰ Act July 12, 1882, c. 290, 22 Stat. 162 (U. S. Comp. St. 1901, p. 3457); post, p. 411.

In such case it may sue and be sued. *Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574. It may continue to elect officers and directors. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187,

Capital Stock—in General

The act prescribes the minimum amount of capital, which varies according to the population of the place in which the bank is organized.³¹ The capital stock, the amount of which must be stated in the articles, must be divided into shares of \$100 each, is to be deemed personal property, and is transferable on the books of the association in such manner as may be prescribed by the by-laws or articles.³² At least 50 per cent. of the capital stock must be paid in before the bank shall be authorized to commence business, and the remainder shall be paid in installments as provided by the act.³³ If a shareholder fails to pay any installment, the directors may sell his stock, and if there be no bidder the amount previously paid shall be forfeited, and the stock sold, or, if not sold, shall be canceled and deducted from the capital stock; but if the capital is thereby reduced below the minimum, it must be increased to the required amount.³⁴

Increase

By Rev. St. U. S. § 5142, any association may by its articles of association provide for an increase of its capital from time to time, but the maximum of such increase must be determined by the comptroller of the currency, and no increase is valid until the whole amount is paid in, and notice thereof transmitted to the comptroller, and his certificate is obtained, specifying the amount, with his approval, and that it has been paid in. The above section was modified in 1886 by an act which provides that any association may, with the approval of the comptroller by vote of the shareholders owning two-thirds of the stock, increase its capital, in accordance with existing laws, to

19 N. E. 353, 1 L. R. A. 781. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 236; *Cent. Dig.* §§ 888-892.

³¹ Rev. St. U. S. § 5138, as amended by Act March 14, 1900, c. 41, § 10, 31 Stat. 48 (U. S. Comp. St. 1901, p. 3461).

³² Rev. St. U. S. §§ 5134, 5139 (U. S. Comp. St. 1901, pp. 3454, 3461).

³³ Rev. St. U. S. § 5140 (U. S. Comp. St. 1901, p. 3461).

³⁴ Rev. St. U. S. § 5141 (U. S. Comp. St. 1901, p. 3462).

any sum approved by the comptroller, notwithstanding the limit fixed in the original articles and determined by the comptroller, and that no increase, either within or beyond the limit fixed in the original articles, shall be made except in the manner provided.³⁵

To constitute a valid increase, under the terms of section 5142, three things must concur: (1) That the association, in the mode pointed out in the articles, and not in excess of the maximum provided for by them, shall assent to an increased amount; (2) that the whole amount of the proposed increase shall be paid in as part of the capital; and (3) that the comptroller, by his certificate specifying the amount of such increase, approve and certify to the fact of its payment.³⁶ When a bank undertakes to increase its capital by a certain amount, and a smaller amount is actually paid in, it can reduce the amount of the increase to the amount paid in; the amount of increase within the maximum being always subject to the discretion of the bank.³⁷ The primary object of the provision that no increase shall be valid until the whole amount has been paid in was to prevent the watering of stock; that is, to prevent business being done upon the basis of a capital which did not in fact exist. "If this provision is disregarded by a national bank, the conduct of its business could no doubt be controlled by the representatives of the government, so far as might be necessary to compel obedience to the law. Rev. St. U. S. §

³⁵ Act May 1, 1886, c. 73, 24 Stat. 18 (U. S. Comp. St. 1901, p. 3462).

³⁶ *Delano v. Butler*, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260. See, also, *Winters v. Armstrong* (C. C.) 37 Fed. 508; *McFarlin v. First Nat. Bank*, 68 Fed. 868, 16 C. C. A. 46; *Schierenberg v. Stephens*, 32 Mo. App. 314; *City of Charleston v. People's Nat. Bank*, 5 S. C. 103, 22 Am. Rep. 1. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 241; *Cent. Dig.* §§ 898-903.

³⁷ *Delano v. Butler*, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260. See, also, *Aspinwall v. Butler*, 133 U. S. 595, 10 Sup. Ct. 417, 33 L. Ed. 779. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 241; *Cent. Dig.* §§ 898-903.

5205 [U. S. Comp. St. 1901, p. 3495]. But the statute does not, in terms, make void a subscription or certificate of stock, based on increased capital stock actually paid in, simply because the whole amount * * * has not in fact been paid into the bank.”³⁸ Accordingly it has been held that a holder of certificates of stock cannot escape liability as a stockholder to creditors under section 5151 (U. S. Comp. St. 1901, p. 3465), on the ground that the shares which he holds are part of an increase which was made without compliance with the act of 1886, even if he has been induced to take such shares by fraud of the officers of the bank and of the comptroller.³⁹

³⁸ *Scott v. Deweese*, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822. See “*Banks and Banking*,” *Dec. Dig. (Key No.)* § 241; *Cent. Dig.* §§ 898–903.

³⁹ A holder of certificates cannot escape liability as a stockholder to creditors on the ground that the shares are part of an increase which was made without compliance with the conditions of Act May 1, 1886, c. 73, 24 Stat. 18 (U. S. Comp. St. 1901, p. 3462), even if he has been induced to take such shares by fraud of the officers of the bank and of the Comptroller. *Scott v. Deweese*, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822.

Where a shareholder subscribes to an increase, and pays his subscription, and the bank afterwards reduces the amount of the increase, he waives all right to deny that his agreement binds him as a subscription to the reduced amount, when he pays on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business from being closed under the notice of the comptroller of the currency provided for in section 5205, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3495). *Delano v. Butler*, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260.

Where a person subscribes to a proposed increase, and pays his subscription, he is bound, though the bank, under the provisions of its by-laws, to “determine what disposition shall be made of the privilege of subscribing for the new stock,” when it has not all been subscribed for within the time given in its notice, limits the amount of the increase to the amount paid in. *Aspinwall v. Butler*, 133 U. S. 595, 10 Sup. Ct. 417, 33 L. Ed. 779.

Where a subscriber for a proposed increase pays and receives a receipt, and is entered as a stockholder, she becomes a stockholder, though her certificate, which was made out for her when she should

Reduction

Any association, by the vote of the shareholders owning two-thirds of its capital stock, may reduce its capital to any sum not below the amount required by the act; but no such reduction is allowable which will reduce the capital below the amount required for its outstanding circulation, and no reduction may be made until its amount has been reported to the comptroller, and his approval obtained.⁴⁰ When a bank reduces its capital, it cannot retain as a surplus fund, or for any other purpose, the whole or any portion of the money which it receives for the stock which is retired; but the capital, to the extent of the reduction, being no longer required for the purpose for which it was subscribed, must be returned to the stockholders.⁴¹ It is otherwise if the capital is impaired, and a reduction is made merely to meet the impairment, and in such case there can be no distribution among the shareholders.⁴² But on a reduction of the capital by a vote of the shareholders, approved by the comptroller on the assurance of the president and directors that bad and doubtful assets will be charged off and set aside for the benefit of the then shareholders, the directors may charge off the bad and doubtful assets as in effect a dividend from assets in excess of capital stock, and thereupon the right to receive the assets thus set apart is irrevocably vested in those who

call for it, was not called for or sent to her. Her position was not affected by the fact that subsequently, by due proceedings, but unknown to her, the amount of the proposed increase was reduced. *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 11 Sup. Ct. 984, 35 L. Ed. 702. See, also, *Latimer v. Bard* (C. C.) 76 Fed. 536; *Columbia Nat. Bank of Tacoma v. Mathews*, 85 Fed. 934, 29 C. C. A. 491; *Brown v. Tillinghast*, 93 Fed. 326, 35 C. C. A. 323. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 241; *Cent. Dig.* §§ 898-903.

⁴⁰ Rev. St. U. S. § 5143 (U. S. Comp. St. 1901, p. 3463).

⁴¹ *Seeley v. New York Nat. Exch. Bank*, 78 N. Y. 608, affirming 8 Daly, 400, 1 Nat. Bank Cas. 804. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 241; *Cent. Dig.* § 901.

⁴² The capital had become impaired by nonpayment of interest on bills and notes, which were among the assets, to the amount of \$71,000, and in order to avoid an assessment by the comptroller the stock-

are shareholders on the date of the comptroller's approval of the reduction.⁴³

Impairment of Capital

Every association which fails to pay up its capital stock, or whose capital becomes impaired by losses or otherwise, within three months after notice thereof from the comptroller of the currency, must pay the deficiency in the capital stock, by assessment upon the shareholders pro rata; and if the association fails so to pay, and refuses to go into liquidation, a receiver may be appointed to close up its business. If a shareholder neglects or refuses, after three months' notice, to pay the assessment, it is the duty of the directors to cause a sufficient amount of his stock to be sold at public auction to make good the deficiency.⁴⁴ The assessment to be made on notice that the capital is impaired, so as to avoid liquidation, is not the assessment contemplated by the section by which the shareholders may be compelled to discharge their individual responsibility for the debts of the association, a liability which does not arise except in case of liquidation and for the purpose of winding up the affairs of the bank.⁴⁵ It is to be

holders reduced the capital stock, and carried the bills and notes to the account of suspended or "bad debts," which were not thereafter included as assets, although retained in the bank's custody. Some years afterwards the bank realized \$75,000 from collaterals pledged for the security of the bills and notes. On a suit by a stockholder to compel the bank to distribute to him a share of the amount realized, proportioned to the amount of stock surrendered, held, that he could not recover. *McCann v. First Nat. Bank of Jeffersonville*, 112 Ind. 354, 14 N. E. 251. See, also, *Id.*, 131 Ind. 95, 30 N. E. 893. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 38; *Cent. Dig.* § 43.

⁴³ *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, affirmed *Jerome v. Cogswell*, 204 U. S. 1, 27 Sup. Ct. 241, 51 L. Ed. 343. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 241; *Cent. Dig.* §§ 898-903.

⁴⁴ Rev. St. U. S. § 5205, as amended by Act June 30, 1876, c. 156, § 4, 19 Stat. 64 (U. S. Comp. St. 1901, p. 3495); ante, p. 369.

⁴⁵ See *Delano v. Butler*, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 241; *Cent. Dig.* §§ 898-903.

made by the stockholders themselves, and an assessment by the directors is void; ⁴⁶ and it is enforceable only by subjecting the stock of the stockholders who refuse to pay to sale, and no action lies against the stockholders personally.⁴⁷ A sale to meet the assessment is void, unless the stock brings an amount equal to the assessment.⁴⁸

Subscription to and Issue of Stock

The act does not prescribe any particular formalities in respect to subscriptions to stock. "Without express regulations to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper officer, and being entered on the stock book as a stockholder. He may take out a certificate or not as he sees fit. * * * A certificate is authentic evidence of title to the stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact that exists independently of itself."⁴⁹ A subscription induced by fraud is voidable at the option of the subscriber, but is valid until repudiated, and if the subscriber affirms the subscription after knowledge of the fraud he cannot afterwards repudiate it. He will affirm, if with knowledge he takes part as a shareholder in the management, or pays assessments on his shares, or takes any benefit from them.⁵⁰ And it has been held that one who has been induced to subscribe to stock in a national bank, who continues,

⁴⁶ *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243, 24 Sup. Ct. 253, 48 L. Ed. 425; *Hulitt v. Bell* (C. C.) 85 Fed. 98. See, also, *In re Hulitt* (C. C.) 96 Fed. 785. See "*Banks and Banking*," *Dec. Dig.* (Key No.) §§ 241, 246; *Cent. Dig.* §§ 898-903.

⁴⁷ *Hulitt v. Bell* (C. C.) 85 Fed. 98. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 246; *Cent. Dig.* §§ 911, 912.

⁴⁸ *Merchants' Nat. Bank of Rome v. Fouche*, 103 Ga. 851, 31 S. E. 87. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 246; *Cent. Dig.* §§ 911, 912.

⁴⁹ *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 11 Sup. Ct. 984, 35 L. Ed. 702. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 242.

⁵⁰ *Clark, Corp.* (2d Ed.) 277 et seq.

until the bank is placed in liquidation, to act as a stockholder and receives dividends, though without knowledge of the fraud, cannot rescind as against the bank's creditors.⁵¹

TRANSFER OF SHARES

96. The capital stock is personal property, and is transferable on the books of the association, as may be prescribed in the by-laws or articles, and every person becoming a shareholder by such transfer succeeds to the rights and liabilities of the holder of the shares. As between seller and buyer, a sale of shares is complete when the certificate, duly assigned, with power to transfer on the books, is delivered. Transfer on the books is necessary to protect the seller against subsequent liability as a stockholder to creditors of the association; but it seems that the rights of an unregistered transferee are superior to the rights of an attaching creditor of the transferror without notice.

The act provides that the capital stock is transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association, that every person becoming a shareholder by such transfer shall succeed to the rights of the prior holder of the shares, and that no change shall be made in the articles by which the rights, remedies, or security of the existing creditors shall be impaired.⁵²

A stockholder may make a bona fide transfer to any person capable of taking and holding the stock and assuming the trans-

⁵¹ *Scott v. Latimer*, 89 Fed. 843, 33 C. C. A. 1. See, also, *Wallace v. Hood* (C. C.) 89 Fed. 11; *Hood v. Wallace*, 97 Fed. 983, 38 C. C. A. 692, affirmed 182 U. S. 555, 21 Sup. Ct. 885, 45 L. Ed. 1227; *Lantry v. Wallace*, 97 Fed. 865, 38 C. C. A. 510. Cf. *Stufflebeam v. De Lashmutt* (C. C.) 101 Fed. 367. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 242.

⁵² Rev. St. U. S. § 5139 (U. S. Comp. St. 1901, p. 3461).

ferror's liabilities.⁵³ The directors or other shareholders have no authority to approve or reject a bona fide transfer, nor can they refuse to register it without a valid and lawful reason.⁵⁴ As between the seller and buyer of shares, the sale is complete when the certificate, duly assigned, with power to transfer the same on the books of the bank, is delivered, and payment therefor received.⁵⁵ "The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and *perhaps* also to protect the purchaser against proceedings of the seller's creditors."⁵⁶ The question of the rights of an attaching creditor to stock transferred by an unregistered assignment is left in the passage above quoted as not definitely settled. The view has generally prevailed, however, that the provisions of the National Bank Act with reference to the transfer on the books of the association was enacted for the benefit of the corporation, its shareholders, and creditors, and that as to other persons a transfer good at common law is sufficient, and that the rights of a transferee under an unregistered assignment are superior to the rights of a subsequent attaching creditor of the transferror without notice.⁵⁷

⁵³ *Johnson v. Laffin*, Fed. Cas. No. 7,393, 5 Dill. 65. See "*Banks and Banking*," Dec. Dig. (Key No.) § 243; Cent. Dig. §§ 904-908.

⁵⁴ *Johnson v. Laffin*, Fed. Cas. No. 7,393, 5 Dill. 65, affirmed *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532. See "*Banks and Banking*," Dec. Dig. (Key No.) § 243; Cent. Dig. §§ 904-908.

⁵⁵ *Johnson v. Laffin*, Fed. Cas. No. 7,393, 5 Dill. 65. See, also, *Larimer v. Beardsley*, 130 Iowa, 706, 107 N. W. 935. See "*Banks and Banking*," Dec. Dig. (Key No.) § 243; Cent. Dig. §§ 904-908.

⁵⁶ *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; post, p. 388. See "*Banks and Banking*," Dec. Dig. (Key No.) § 243; Cent. Dig. §§ 904-908.

⁵⁷ *Continental Nat. Bank v. Eliot Nat. Bank* (C. C.) 7 Fed. 369; *Scott v. Pequonnock Nat. Bank* (C. C.) 15 Fed. 494; *Hazard v. Na-*

LIEN ON SHARES

97. The association has not by the act a lien on the shares of stockholders for debts due from them to it; and any provision in the by-laws or articles prohibiting the transfer of shares of a stockholder indebted to the association, or otherwise giving the association a lien on his shares, is invalid.

At common law a corporation has no lien on the shares of its stockholders for debts due to it from them, and the fact that a stockholder is indebted to the corporation is not ground for its refusal to recognize and register a bona fide transfer, unless a lien is given or authorized by the charter.⁵⁸ Under the act of 1863 the transfer of stock was subject to debts due by the stockholders to the bank, but that act was repealed by the act of 1864, which contains no such provision, and which prohibits any national bank from making loans or discounts on the security of or purchasing or holding the shares of its own capital stock.⁵⁹ Under the present law a national bank cannot acquire a lien on the shares of its stockholders. It is true that the directors have power to define and regulate, by by-laws not inconsistent with the provisions of the act, the manner in which the stock shall be transferred, and that the stock is transferable on the books in such manner as may be prescribed by the by-laws or articles.⁶⁰ But power to make and enforce a by-law giving a lien is not given, and any provision of the articles or by-laws prohibiting the transfer of stock owned by a stock-

tional Exch. Bank (C. C.) 26 Fed. 94; *Doty v. First Nat. Bank of Larimore*, 3 N. D. 9, 53 N. W. 77, 17 L. R. A. 259. See, also, *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 243; *Cent. Dig.* §§ 904-908.

⁵⁸ *Clark, Corp.* (2d Ed.) 401, 443.

⁵⁹ *Ante*, pp. 249, 279. See cases cited post, note 61.

⁶⁰ *Rev. St. U. S.* §§ 5136, 5139 (*U. S. Comp. St.* 1901, pp. 3455, 3461).

holder indebted to the bank until such indebtedness shall be satisfied, or otherwise giving the bank a lien on his shares, is invalid.⁶¹

RIGHTS OF STOCKHOLDERS

98. Every stockholder is entitled to vote at meetings of the shareholders in person or by proxy, and has the common-law right to inspect the books of the corporation.

Right to Vote

In elections of directors and in deciding all questions at meetings of shareholders, shareholders are entitled to one vote on each share held by them, and may vote by proxies duly authorized in writing; but officers, clerk, teller, or bookkeeper, may act as a proxy, and no shareholder whose "liability is past due and unpaid" shall be allowed to vote.⁶² The past-due and unpaid liability of a shareholder which disqualifies him from voting is limited to his liability for unpaid subscriptions to stock.⁶³

Right to Examine Books

The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation, is not restricted as to national banks by Rev. St. U. S. § 5211 (U. S. Comp. St. 1901, p. 3498), requiring such banks to make reports to the comptroller of the currency, or by section 5240 (page 3516), providing for

⁶¹ *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *Bullard v. National Eagle Bank*, 18 Wall. 589, 21 L. Ed. 923; *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 24 Sup. Ct. 524, 48 L. Ed. 801. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 245; *Cent. Dig.* §§ 909, 910.

⁶² Rev. St. U. S. § 5144 (U. S. Comp. St. 1901, p. 3463).

⁶³ *United States v. Barry* (C. C.) 36 Fed. 246. See "*Banks and Banking*," *Cent. Dig.* § 941; "*Corporations*," *Dec. Dig. (Key No.)* § 197; *Cent. Dig.* §§ 747-763.

the appointment of examiners, or by section 5241 (page 3517), providing that no bank "shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice"; and, in order to determine the value of his stock, a stockholder may obtain such relief in the state courts under a state statute declaring the books of any corporation subject to the inspection of stockholders.⁶⁴

DIVIDENDS

99. Power to declare dividends is expressly conferred upon the directors, subject to certain limitations. The declaration of dividend in violation of the act, while it may be ground for forfeiture of the charter, and for an action against the directors for damages suffered by the association, does not render them liable criminally.

The directors may semiannually declare a dividend of so much of the net profits as they shall judge expedient; but the association must, before declaring a dividend, convey one-tenth of its net profits of the preceding half year to its surplus fund until it shall amount to 20 per cent. of its capital stock.⁶⁵ No portion of the capital must be withdrawn in the form of dividends or otherwise; and if losses equal to or exceeding the net profits have been sustained, no dividend shall be made; and no dividend shall ever be made to an amount greater than the net profits then on hand, deducting therefrom losses and bad debts, all debts due the association on which interest is past

⁶⁴ *Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130. See, also, *Winter v. Baldwin*, 89 Ala. 483, 7 South. 734; *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893; *People ex rel. Lorge v. Consolidated Nat. Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 43, 246; *Cent. Dig.* §§ 61, 912.

⁶⁵ Rev. St. U. S. § 5199 (U. S. Comp. St. 1901, p. 3494).

due and unpaid for six months, unless they are well secured and in process of collection being considered bad debts.⁶⁶

Under the foregoing provisions assets which it is not necessary to retain as capital or for the surplus fund may be returned to the shareholders, and dividends so ordered may be made payable in the future, and on the contingency of future collection.⁶⁷ The declaration by the directors of a dividend when there are no net profits to pay it, while an act of maladministration which may subject the association to a forfeiture of its charter and the directors to a personal action for damages suffered by the association or its shareholders, does not render them liable to a criminal prosecution.⁶⁸ Nor can a receiver of the bank recover a dividend paid, not out of profits, but entirely out of the capital, where the stockholders receiving the dividend acted in good faith, believed it to be paid out of profits, and the bank, when it was declared and paid, was not insolvent.⁶⁹ Nor can the directors be held personally liable for money paid out for dividends to a greater amount than net

⁶⁶ Rev. St. U. S. § 5204 (U. S. Comp. St. 1901, p. 3495).

⁶⁷ Cogswell v. Second Nat. Bank, 78 Conn. 75, 60 Atl. 1059, affirmed Jerome v. Cogswell, 204 U. S. 1, 27 Sup. Ct. 241, 51 L. Ed. 343. See "*Banks and Banking*," Dec. Dig. (Key No.) § 244; Cent. Dig. §§ 55, 60, 910.

⁶⁸ United States v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. See "*Banks and Banking*," Dec. Dig. (Key No.) § 256; Cent. Dig. § 964.

⁶⁹ McDonald v. Williams, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022.

The receiver may recover from a stockholder dividends declared and paid after the bank became insolvent, when necessary to meet the demands of creditors. Hayden v. Williams, 96 Fed. 279, 37 C. C. A. 479.

The receiver cannot recover from a stockholder, in an action at law, a sum received by him on a partial distribution of the capital, made and received in good faith during voluntary liquidation, when the bank was at the time solvent, and retained sufficient assets to pay all its liabilities, although it subsequently became insolvent. Lawrence v. Greenup, 97 Fed. 906, 38 C. C. A. 546. See "*Banks and Banking*," Dec. Dig. (Key No.) § 248; Cent. Dig. §§ 913-915.

profits after deducting losses and bad debts, because there were debts bad in fact, but supposed to be good; bad judgment, without bad faith, not making the directors individually liable.⁷⁰

LIABILITY OF STOCKHOLDERS FOR DEBTS OF BANK

100. The shareholders are individually liable equally and ratably, for the debts of the association, to an amount equal to the amount of the stock held by them, at its par value, in addition to the amount that may be due on the shares.

The act provides that the shareholders of every association "shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."⁷¹

"The liability exists by virtue of the statute and the assent of the incorporators to its provisions, given by the contract which they entered into with Congress in accepting the charter. With respect to the character of that liability * * * it is several, and cannot be made joint, and * * * the shareholders are not intended to be put in the relation of sureties or guarantors, 'one for another,' as to the amount which each might be required to pay. * * * The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not affect the liability of another."⁷² The statute imposes upon the

⁷⁰ Witters v. Sowles (C. C.) 31 Fed. 1.

The liability cannot be enforced in an action at law. Welles v. Graves (C. C.) 41 Fed. 459; post, p. 397. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* § 951.

⁷¹ Rev. St. U. S. § 5151 (U. S. Comp. St. 1901, p. 3465).

⁷² United States ex rel. Citizens' Nat. Bank v. Knox, 102 U. S. 422, 26 L. Ed. 216. See, also, Lease v. Barschall (C. C.) 106 Fed. 762. Cf. Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50

shareholders "an individual responsibility for all its contracts, debts, and engagements, and the terms in which the obligations are created is unconditional and unqualified, except that the liability shall be equal and ratable among the stockholders."⁷³ As the liability of the stockholder is for the debts, contracts, and engagements of the bank, he is liable for such interest as, according to the nature of the contract or debt, would exist against the bank.⁷⁴

WHO ARE LIABLE AS SHAREHOLDERS

101. Those who appear as shareholders on the books of the association are prima facie liable as such. But there are some exceptions:

1. A person in whose name shares are registered without his knowledge or consent, express or implied, is not liable.

2. The real owner is liable, although he has caused the shares to be registered in the name of another, whether in good faith or in order to conceal his ownership.

3. A mere pledgee is not liable, if the shares are registered in his name as such, or are registered in the name of another.

4. A trustee is not liable, if the shares are registered in his name as such; but the persons whom or the estate which he represents are liable.

5. When there is a valid and complete transfer on the books, the transferror is relieved from liability.

L.-Ed. 732. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁷³ *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁷⁴ *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

ity, and the transferee succeeds thereto. A transferor is relieved, although the transfer is not registered, if he has done everything to effect registration that a careful man could reasonably do. A transferor is not relieved by a colorable transfer; nor is he relieved by a transfer out and out, if made in view of the insolvency of the association and in fraud of creditors to an irresponsible person, or even to a responsible person, unless the transferor can prove that he was responsible; but in such cases the transferee also is liable.

Who Deemed to be Shareholder

As a rule, any one whose name appears on the books of the bank as a stockholder is a shareholder for purposes of assessment; and the burden of showing that he is not a shareholder rests upon him.⁷⁵ Of course, a transfer on the books of the bank to a person without his knowledge and consent would not subject him to the liability of a shareholder;⁷⁶ but if he ratifies or acquiesces in the transfer, as by accepting benefits thereunder, he is liable.⁷⁷ For this purpose a transfer on the books,

⁷⁵ *Irons v. Manufacturers' Nat. Bank (C. C.)* 17 Fed. 308; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Finn v. Brown*, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. Ed. 936. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁷⁶ *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531; *Stephens v. Follett (C. C.)* 43 Fed. 842.

One buying stock in the names of minor children is liable, since they are incapable of assenting. *Foster v. Chase (C. C.)* 75 Fed. 797; *Foster v. Wilson (C. C.)* 75 Fed. 797. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁷⁷ *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531.

If one is elected to an office for which ownership of stock is a qualification, and shares are transferred to him on the books, and he acts as such officer, he will be chargeable with knowledge that shares stand in his name. *Finn v. Brown*, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. Ed. 936.

One who was notified that shares had been transferred into his

without the issue of a new certificate, is sufficient.⁷⁸ The fact that record owners may be held does not necessarily mean that actual holders may not be held. The real owner is liable, and one purchasing for himself and causing the transfer to be made in the name of another, whether in good faith or so as to conceal his ownership, is liable.⁷⁹ A married woman, who is a stockholder, is subject to the statutory liability, although she may be incapable under the local law from making or binding herself personally by a contract, if such law does not incapacitate her from becoming the owner of such stock.⁸⁰ One who becomes a stockholder in consequence of frauds practiced upon him by others, whether the officers of the bank or of the government, is estopped, as against creditors, to deny that he is a shareholder, if at the time the rights of creditors accrued he was accorded and exercised the rights of a shareholder.⁸¹

name, although he had in fact no interest therein, and who indorsed the certificates in blank, but took no steps to have the stock transferred to the name of the true owner, cannot avoid liability for an assessment thereon. *Kenyon v. Fowler*, 155 Fed. 107, 83 C. C. A. 567, affirmed 215 U. S. 593, 30 Sup. Ct. 409, 54 L. Ed. 341. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁷⁸ *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁷⁹ *Davis v. Stevens*, Fed. Cas. No. 3,653, 17 Blatchf. 259; *Hubbell v. Houghton* (C. C.) 86 Fed. 547; *Houghton v. Hubbell*, 91 Fed. 453, 33 C. C. A. 574. See, also, *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁸⁰ *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531; *Christopher v. Norvell*, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732 (and cases cited). See, also, *Bundy v. Cocke*, 128 U. S. 185, 9 Sup. Ct. 242, 32 L. Ed. 396. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁸¹ *Scott v. Deweese*, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822.

Fraudulent representations by which one is induced to take shares is no defense in an action at law by the receiver to enforce the liability. *Lantry v. Wallace*, 182 U. S. 536, 21 Sup. Ct. 878, 45 L.

Pledgee

If stock is issued or transferred to a person in such a way that he appears on the books as the legal and real owner, the creditors cannot be required to go behind the books, and he is subject to the liability to creditors, though he may hold the stock only as collateral security.⁸² On the other hand, a pledgee of shares, who appears on the books to be such, and not to be the owner, is not liable.⁸³ And in the absence of actual fraud or bad faith a mere pledgee of shares is not liable, where he is not registered as the owner, although he has procured a transfer of the shares to an irresponsible person with the avowed purpose of avoiding such liability.⁸⁴ But if the pledgee ceases to be such, and becomes the real owner of the shares, al-

Ed. 1218; *Hood v. Wallace*, 182 U. S. 555, 21 Sup. Ct. 885, 45 L. Ed. 1227. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁸² *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Bowden v. Farmers' & Merchants' Nat. Bank of Baltimore*, Fed. Cas. No. 1,714, 1 Hughes, 307. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁸³ *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844.

A bank which receives as collateral for a note the stock of a national bank, and on default proceeds to sell the stock and bid it in, is not liable as a stockholder in the national bank, where it never has a transfer made on the books, and as between the pledgee bank and the debtor, who claims that the sale is invalid, the stock continues to be held merely as collateral for his debt. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 21 Sup. Ct. 383, 45 L. Ed. 536.

Where stock stood in the name of one as cashier of another bank, it was not estopped to show that it held the stock as collateral, in the absence of evidence that the insolvent bank or its creditors relied on the supposed ownership. *Frater v. Old Nat. Bank of Providence, R. I.*, 101 Fed. 391, 42 C. C. A. 133. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁸⁴ *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 4 Sup. Ct. 525, 28 L. Ed. 478. See, also, *Rankin v. Fidelity Insurance Trust & Safe-Deposit Co.*, 189 U. S. 242, 23 Sup. Ct. 553, 47 L. Ed. 792; *National Park Bank v. Harmon*, 79 Fed. 891, 25 C. C. A. 214, affirmed *Harmon v. National Park Bank*, 172 U. S. 644, 19 Sup. Ct. 877, 43 L.

though in fact they are not registered in his name, he may be held liable as a shareholder.⁸⁵

Trustee

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner, and to the same extent as the testator, intestate, ward or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."⁸⁶ A trustee, though not appointed by will or order of court, is not personally liable upon stock owned by his cestui que trust, but standing in his name as trustee, where he has been guilty of no fraud, concealment, or negligence.⁸⁷ The fact that the trust estate is wiped out by the insolvency of the bank does not charge the trustee individually.⁸⁸ If the stock is

Ed. 1182; *Wilson v. Merchants' Loan & Trust Co.*, 98 Fed. 688, 39 C. C. A. 231; *Hayes v. Fidelity Insurance, Trust & Safe-Deposit Co.* (C. C.) 105 Fed. 160. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁸⁵ The pledgee of stock as collateral for a note, with power of public or private sale for the liquidation of the pledge, becomes the beneficial owner, and as such subject to the liability of a stockholder, where, after the death of the pledgor, it causes the stock to be registered in the name of an employé with no beneficial interest, and afterwards indorses on the note the supposed value of the stock as of the date of the credit, and presents the note, as reduced by the amount of such valuation, to the pledgor's administrator, who allows the claim in this form. *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 27 Sup. Ct. 179, 51 L. Ed. 423. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁸⁶ Rev. St. U. S. § 5152 (U. S. Comp. St. 1901, p. 3465).

⁸⁷ *Lucas v. Coe* (C. C.) 86 Fed. 972.

So of a father, who invests funds of his children arising from an investment of his own money previously made by him in their names and behalf, who takes the stock simply in his own name as "trustee." *Fowler v. Gowing*, 165 Fed. 891, 91 C. C. A. 569. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁸⁸ *Fowler v. Gowing* (C. C.) 152 Fed. 801. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

registered in the name of the trustee as such, although he be simply described as "trustee," without more, he is protected from personal liability.⁸⁹ But one appearing on the books to be the absolute owner of the stock is subject to liability, although holding it as trustee.⁹⁰ Where a guardian as such owns stock, neither he nor his ward are subject to personal liability, but only the estate of the ward in his hands is liable.⁹¹

Deceased Stockholders

The individual liability of the stockholders is an essential element of the contract by which they become members of the corporation, and therefore the obligation survives against the personal representatives of a deceased stockholder.⁹² The es-

⁸⁹ Welles v. Larrabee (C. C.) 36 Fed. 866; Lucas v. Coe (C. C.) 86 Fed. 972; Fowler v. Gowing, 165 Fed. 891, 91 C. C. A. 569; Id. (C. C.) 152 Fed. 801.

One registered as owner, but who holds in trust for the real owner, is not liable when the other has been adjudged liable, though nothing is realized on execution of such judgment. Yardley v. Wilgus (C. C.) 56 Fed. 965. See "*Banks and Banking*," Dec. Dig. (Key No.) § 248; Cent. Dig. §§ 913-931.

⁹⁰ Davis v. First Baptist Society of Essex, Fed. Cas. No. 3,633; Kerr v. Urie, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493. See, also, Horton v. Mercer, 71 Fed. 153, 18 C. C. A. 18. See "*Banks and Banking*," Dec. Dig. (Key No.) § 248; Cent. Dig. §§ 913-931.

⁹¹ Clark v. Ogilvie, 111 Ky. 181, 63 S. W. 429. See "*Banks and Banking*," Dec. Dig. (Key No.) § 248; Cent. Dig. §§ 913-931.

⁹² Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. See, also, Witters v. Sowles (C. C.) 25 Fed. 168; Parker v. Robinson, 71 Fed. 256, 18 C. C. A. 36; Baker v. Beach (C. C.) 85 Fed. 836; Tourtelot v. Finke (C. C.) 87 Fed. 840; Brown v. Ellis (D. C.) 103 Fed. 834.

Rev. St. U. S. § 5152 (U. S. Comp. St. 1901, p. 3465), does not affect the liability of the estate. Davis v. Weed, Fed. Cas. No. 3,658; Irons v. Manufacturers' Nat. Bank (D. C.) 21 Fed. 197.

Where an administrator, who is also sole heir and next of kin, takes into his possession bank stock belonging to the intestate, votes such stock, and draws the dividends, but does not have the stock transferred to his name, he does not thereby become personally liable as owner of the stock before his duties as administrator are

tate is liable to an assessment levied against the executors in consequence of a failure of the bank after the shareholder's death.⁹³ So the widow and heirs of a shareholder, to whom the probate court allots the shares of stock in indivision, in proportion to their interest in the estate, but who let the stock stand in the name of the deceased, without any notice of their title to it, are liable to assessments on the stock if the bank subsequently becomes insolvent.⁹⁴

Effect of Transfer

The act provides that the share shall be transferable on books of the association in such manner as may be prescribed by the articles or by-laws, and that "every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to the rights and liabilities of the prior holder."⁹⁵ It follows that a valid and complete transfer relieves the transferor of liability, and substitutes the transferee in his place, and that until such transfer the prior holder is the stockholder and liable for the debts of that corporation.⁹⁶ Thus, when a

ended. In *re Bingham*, 126 N. Y. 296, 27 N. E. 1055. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁹³ *Wickham v. Hull* (C. C.) 60 Fed. 326. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁹⁴ *Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571. Enforcing the whole amount of an assessment, to the extent of the distributive share received, against one of the heirs or next of kin to whom the stock has been allotted by the probate court in indivision, in proportion to their interest in the estate, pursuant to a state statute, does not violate any rights under the federal statutes. *Matteson v. Dent*, *supra*. Cf. *Witters v. Sowles* (C. C.) 32 Fed. 130.

Where stock is bequeathed to one for life, with remainder over, an assessment after the death of testator is payable only by the beneficiaries of the bequest, and testator's estate cannot be made liable. *Blackmore v. Woodward*, 71 Fed. 321, 18 C. C. A. 57. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 913-931.

⁹⁵ Rev. St. U. S. § 5139 (U. S. Comp. St. 1901, p. 3461).

⁹⁶ *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

shareholder sold his stock several months before the insolvency of the bank, but the transfer was not registered on the books until the date of the bank's failure, the shareholder was subject to the statutory liability.⁹⁷ But a shareholder who has sold his stock is not liable merely because the transfer is not registered, if he is not in any way responsible for the omission, but has done everything that a careful and prudent business man could reasonably do to effect a transfer.⁹⁸ Thus, where a shareholder, before the suspension of the bank, had made a bona fide sale and surrendered his certificates, and delivered to the president of the bank a power sufficient to effect, and intended to effect, as that officer knew, a transfer on the books to the purchaser, it was held that a receiver could not recover against him for an assessment.⁹⁹

In order to relieve the transferror from liability, the transfer must be to some one capable of taking and holding the stock and assuming the transferror's liability. A transfer to an infant will not relieve the transferror.¹⁰⁰ Since a national bank is without power to purchase its own stock, a sale and transfer to the bank does not relieve the transferror.¹⁰¹

⁹⁷ *Richmond v. Irons*, 121 U. S. 27, 27 Sup. Ct. 788, 30 L. Ed. 864. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

⁹⁸ *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

⁹⁹ *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266. See, also, *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373; *Hayes v. Schoemaker* (C. C.) 39 Fed. 319; *Snyder v. Foster*, 73 Fed. 136, 19 C. C. A. 406; *Earle v. Coyle* (C. C.) 95 Fed. 99; *Kimball v. Aspey*, 164 Fed. 830, 90 C. C. A. 634. Cf. *Schofield v. Twining* (C. C.) 127 Fed. 486. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

¹⁰⁰ *Aldrich v. Bingham* (D. C.) 131 Fed. 363. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

¹⁰¹ See *Johnson v. Laffin*, Fed. Cas. No. 7,393, 5 Dill. 65, affirmed *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; ante, p. 249. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

While a shareholder has generally a right to transfer his shares, and thereby disconnect himself from the corporation, and from responsibility on account of it, there are limits to that right. A transfer, which is merely colorable—that is, where the transferee is a mere tool of the transferor—so that as between the transferor and the transferee there is no real transfer, as where the transferee is bound to retransfer on request and the benefits of ownership continue in the transferor, does not relieve the transferor of his liability.¹⁰² Again even if the transfer is out and out, if the stockholder, knowing or having good reason to believe that the bank is insolvent, concludes with an irresponsible person, with design to substitute the latter in his place, and thus escape individual liability, transfers his shares to such person, the transaction will be deemed a fraud on creditors, and the transferor will be held liable.¹⁰³

¹⁰² *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *McDonald v. Dewey*, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128. See, also, *Foster v. Lincoln's Ex'r*, 79 Fed. 170, 24 C. C. A. 470.

Where an executor, without consideration, transfers bank stock in trust for his own benefit, and to enable the transferee to become a director of the bank, the title, for the purposes of assessment, remains with the executor. *Witters v. Sowles* (C. C.) 32 Fed. 130. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

¹⁰³ *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386.

Reasonable ground to apprehend failure is enough. *Cox v. Montague*, 78 Fed. 845, 24 C. C. A. 364.

Knowledge that the bank's reserve is below the limit fixed by Rev. St. U. S. § 5191 (U. S. Comp. St. 1901, p. 3486), is not enough to avoid the transaction in the event of future suspension. A bona fide sale is not a fraud on creditors because the bank is then insolvent, if the fact be unknown to the seller. *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373. See, also, *Vandagriff v. Rich Hill Bank*, 163 Fed. 823, 90 C. C. A. 129; *Fowler v. Crouse*, 175 Fed. 646, 99 C. C. A. 200.

A transfer by way of gift, although to an irresponsible person, cannot be set aside, if made in good faith and without knowledge of the bank's failing condition. *Sykes v. Holloway* (C. C.) 81 Fed. 432. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

And the rule has been applied even where the transferee is solvent. "One who holds such shares (the bank being at the time insolvent) cannot escape the individual liability imposed by the statute by transferring his stock with the intent simply to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, that it is insolvent or about to fail. A transfer with such intent and under such circumstances is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee."¹⁰⁴ The solvency of the transferee is pertinent in showing that no damage could have resulted to the creditors by the transfer; but one who relies upon a sale of shares made with knowledge of the bank's insolvency to escape his statutory liability has the burden of proving that the vendee was financially responsible to the extent of the assessment. Moreover, one who, with knowledge of the bank's insolvency, transfers his shares to an irresponsible vendee, with intent to evade his statutory liability, can be held liable only for the unsatisfied debts existing when the fraudulent transfer was made.¹⁰⁵

Although the transfer is such that the transferrer remains liable, the transferee, having voluntarily assumed the position of a shareholder, is also liable.¹⁰⁶ After the bank has become

¹⁰⁴ *Stuart v. Hayden*, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639.

The insolvency of the purchaser of shares of a bank which subsequently suspends does not render the sale void, as in fraud of the bank's creditors, where the insolvency of the purchaser is unknown to the seller. *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

¹⁰⁵ *McDonald v. Dewey*, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

¹⁰⁶ *Foster v. Lincoln (C. C.)* 74 Fed. 382; *Baker v. Reeves (C. C.)* 85 Fed. 837. See, also, *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

insolvent and closed its doors, the liability of shareholders is so far fixed that any transfer is inoperative as against the creditors.¹⁰⁷

ENFORCEMENT OF SHAREHOLDERS' LIABILITY

102. In case of the involuntary liquidation of the association, the liability of the shareholders is enforced through a receiver appointed by and under the direction of the comptroller of the currency. In case of voluntary liquidation, the liability may be enforced by creditors' bill, or by a receiver appointed by a court of equity to liquidate the debts of the association.

Involuntary Liquidation

In case of the involuntary liquidation of the association, the personal liability of the shareholders is enforced through a receiver appointed by the comptroller of the currency and acting under his direction.¹⁰⁸ It is for the receiver to decide when proceedings are necessary to enforce the liability and to what extent it shall be enforced, and in an action to enforce it such determination must be averred and proved. The creditors of the bank cannot proceed directly in their own names, nor are they proper parties to the suit. When less than the entire liability of stockholders is sought to be enforced, proceedings may be had in equity, and an interlocutory decree may be taken for contribution. When contribution only is sought, all the stock-

¹⁰⁷ *Irons v. Manufacturers' Nat. Bank* (C. C.) 17 Fed. 308. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 916-918.

¹⁰⁸ Rev. St. U. S. § 5234 (U. S. Comp. St. 1901, p. 3507); Act June 30, 1876, c. 156, § 1, 19 Stat. 63 (U. S. Comp. St. 1901, p. 3509); Act Aug. 3, 1892, c. 360, 27 Stat. 345 (U. S. Comp. St. 1901, p. 3513); Act March 2, 1897, c. 354, 29 Stat. 600 (U. S. Comp. St. 1901, p. 3514); post, p. 413.

holders who can be reached by process of the court may be joined, and it will be no objection that there are others beyond the jurisdiction who cannot be reached.¹⁰⁹ When the order of the comptroller is to enforce the full amount of the liability—that is, an amount equal to the par of the stock—the action must be at law.¹¹⁰ Actions by the receiver for assessments on the stock are subject to the state statutes of limitations.¹¹¹

The order of the comptroller, determining to what extent the liability shall be enforced, is conclusive on the stockholders, and cannot be controverted by them in a suit for the recovery

¹⁰⁹ *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476. See, also, *National Bank of Metropolis v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554.

The comptroller may appoint a receiver for an insolvent bank, or make a ratable assessment on the stockholders, without a prior judicial determination of the necessity for a receiver or of the existence of the liabilities of the bank. Rev. St. §§ 5151, 5234 (U. S. Comp. St. 1901, pp. 3465, 3507), empowering the comptroller to appoint receivers for insolvent banks, and to make ratable assessments upon stockholders, does not vest in him a judicial power, in violation of the constitution. *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598.

As to sufficiency of proof of comptroller's determination to enforce liability, see *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386.

As to sufficiency of pleading comptroller's determination, see *Welles v. Stout* (C. C.) 38 Fed. 67; *Young v. Wempe* (C. C.) 46 Fed. 354; *Nead v. Wall* (C. C.) 70 Fed. 806; *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-943.

¹¹⁰ *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168. See, also, *Young v. Wempe* (C. C.) 46 Fed. 354. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-943.

¹¹¹ *Butler v. Poole* (C. C.) 44 Fed. 586; *Price v. Yates*, Fed. Cas. No. 11,418.

As to the applicability of particular statutory provisions, see *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. 437; *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702; *King v. Armstrong*, 9 Cal. App. 368, 99 Pac. 527. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-943.

thereof.¹¹² But the comptroller may make a second assessment upon the shareholders, where the first proves insufficient to pay the debts and liabilities of the bank.¹¹³ The statute of limitations does not commence to run against the enforcement of the entire liability, or of any particular portion thereof, until the comptroller has called the entire liability or the particular portion of it in issue.¹¹⁴

A payment of an assessment made by a bank on its shareholders in order to continue in business and avoid liquidation is not a discharge of the shareholder's liability for the debts of the bank, and cannot be applied thereto.¹¹⁵ Nor can a stockholder, who is also a creditor of the bank, offset against the amount of an assessment ordered by the comptroller an indebtedness of the bank to him, but he must come in with the other general creditors.¹¹⁶

¹¹² *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168. See, also, *Aldrich v. Yates* (C. C.) 95 Fed. 78; *Deweese v. Smith*, 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971.

The determination of the comptroller does not conclude stockholders as to the validity of the debts to pay which the assessment is made. *Moss v. Whitzel* (C. C.) 108 Fed. 579. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-943.

¹¹³ *Studebaker v. Perry*, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. Ed. 528. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-943.

¹¹⁴ *Deweese v. Smith*, 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971. See, also, *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. 437; *Thompson v. German Ins. Co.* (C. C.) 76 Fed. 892; *Howarth v. Ellwanger* (C. C.) 86 Fed. 54; *Aldrich v. Yates* (C. C.) 95 Fed. 78. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-943.

¹¹⁵ *Delano v. Butler*, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* § 926.

¹¹⁶ *Hobart v. Gould* (D. C.) 8 Fed. 57; *Wingate v. Orchard*, 75 Fed. 241, 21 C. C. A. 315. See, also, *Witters v. Sowles* (C. C.) 32 Fed. 130; *Sowles v. Witters* (C. C.) 39 Fed. 403. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* § 929.

Voluntary Liquidation

In case of the voluntary liquidation of the association, no express provision was originally made by the National Bank Act for the enforcement of the liabilities of the shareholders. This omission was supplied by the act of June 30, 1876, which provides that the liabilities of the shareholders may be enforced by any creditor by bill in equity in the nature of a creditors' bill, brought by him on behalf of himself and all other creditors against the shareholders, in any court of the United States having original jurisdiction in equity for the district in which the association may have been located or established.¹¹⁷ It has been held, however, that the remedy of a creditors' suit, provided by this act, is cumulative, and not exclusive.¹¹⁸ Un-

¹¹⁷ Rev. St. U. S. § 5220 (U. S. Comp. St. 1901, p. 3503); Act June 30, 1876, c. 156, § 2, 19 Stat. 63 (U. S. Comp. St. 1901, p. 3509); post, p. 411.

For the history of the legislation, see *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864.

Act June 30, 1876, was not repealed by Act July 12, 1882, c. 290, § 4, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), providing that the jurisdiction for suits by or against any national bank, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against state banks, nor by Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 (U. S. Comp. St. 1901, p. 514), declaring that all national banks, for the purpose of actions by or against them, shall be deemed citizens of the states in which they are respectively located, etc., as such latter sections relate exclusively to suits by or against banking associations themselves. *George v. Wallace*, 135 Fed. 286, 68 C. C. A. 40, affirmed *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738.

Valid obligations of a national bank may, after voluntary liquidation, be enforced against a stockholder who voted against the resolutions looking towards such liquidation, where the requisite amount of stock was voted in favor of that course. *Poppleton v. Wallace*, 201 U. S. 245, 26 Sup. Ct. 298, 50 L. Ed. 743. See, also, *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-939.

¹¹⁸ *King v. Pomeroy*, 121 Fed. 287, 58 C. C. A. 209. See, also, *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864.

The contrary is declared in *Williamson v. American Bank*, 115 Fed.

der the original act, a federal court sitting in equity had jurisdiction in a proper case to appoint a receiver to enforce the liabilities of stockholders of banks in voluntary liquidation. Where a court of equity appoints a receiver to liquidate the debts of the bank in voluntary liquidation, no action of the comptroller is required to empower the receiver to enforce the liability of the shareholders, and the court has plenary power to ascertain the necessity of enforcing the liability, and to direct its receiver to collect it.¹¹⁹ The officers of a bank which has gone into liquidation have no authority to bind the stockholders by the transaction of any business except that necessarily involved in winding up its affairs.¹²⁰

OFFICERS—IN GENERAL

103. The affairs of a national bank are managed by the directors, who appoint the president, cashier, and other officers.

A national banking association has power to elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such

793, 52 C. C. A. 1. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-939.

¹¹⁹ *King v. Pomeroy*, 121 Fed. 287, 58 C. C. A. 209.

The statute of limitations does not run while proper liquidation proceedings are pending in a court of equity. The liability does not mature until the court ascertains the necessity of enforcement, determines the amount which the shareholders must pay, and fixes the time of payment; and the receiver's cause of action does not accrue until the liability thus matures. *King v. Pomeroy*, *supra*. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-939.

¹²⁰ *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 250; *Cent. Dig.* §§ 932-939.

officers at pleasure, and appoint others to fill their places.¹²¹ The affairs of the association are to be managed by not less than five directors, elected at the shareholders' meetings, who hold office for one year and until their successors are elected and have qualified.¹²² Certain qualifications as to citizenship and residence are prescribed, and each director must own a certain number of shares of the capital stock,¹²³ and must take a prescribed oath.¹²⁴ Vacancies are filled by appointment of the remaining directors.¹²⁵ The president must be a director.¹²⁶

CIVIL LIABILITY OF OFFICERS

104. AT COMMON LAW—The directors and other officers of the association are liable to it at common law for losses sustained by misapplication of the bank's funds, or by reason of negligence or inat-

¹²¹ Rev. St. U. S. § 5136 (U. S. Comp. St. 1901, p. 3455).

Directors have discretion whether or not to require bonds. *Robinson v. Hall* (C. C.) 59 Fed. 648.

The office of cashier is not an annual office, but the term continues till resignation, removal, or appointment of a successor, and a by-law providing that the term shall be for one year is nugatory. *Westervelt v. Mohrenstecher*, 76 Fed. 118, 22 C. C. A. 93, 34 L. R. A. 477. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 251; *Cent. Dig.* §§ 940-943, 947.

¹²² Rev. St. U. S. § 5145 (U. S. Comp. St. 1901, p. 3463).

A director may resign within the year. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 251; *Cent. Dig.* §§ 940-943.

¹²³ Rev. St. U. S. § 5146, amended by Act Feb. 28, 1905, c. 1163, 33 Stat. 818 (U. S. Comp. St. Supp. 1909, p. 1318).

A transferee of stock, after expiration of the term of the charter, is not a stockholder, and is ineligible as director. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 251; *Cent. Dig.* §§ 940-943.

¹²⁴ Rev. St. U. S. § 5147 (U. S. Comp. St. 1901, p. 3464).

¹²⁵ Rev. St. U. S. § 5148 (U. S. Comp. St. 1901, p. 3464).

¹²⁶ Rev. St. U. S. § 5150 (U. S. Comp. St. 1901, p. 3465).

tention to their duties, as in the case of other banking corporations; and such liability to the association may be enforced in the same manner, by the association or by a receiver, and, in proper cases, by the shareholders, as well as by creditors, when the association is insolvent.

105. STATUTORY LIABILITY—If the directors knowingly violate, or knowingly permit any of the officers, servants, or agents of the association to violate, any of the provisions of the National Bank Act, every director who participated in or assented to such violation is liable for all damages which the association, its shareholders, or any other person sustains in consequence thereof. Such liability may be enforced by the association, or by a receiver, and, it seems, in proper cases, by the shareholders, as well as by creditors, when the association is insolvent.

Common-Law Liability

As we have seen, the directors and other officers of a national bank are liable to it at common law for losses sustained by reason of misapplication of the bank's funds, or by reason of negligence and inattention to the duties.¹²⁷

Statutory Liability

The National Bank Act provides that if the directors shall knowingly violate or knowingly permit any of the officers, servants, or agents of the association to violate any of the provisions of the title, all the rights, privileges, and franchises of the association shall thereby be forfeited, the violation to be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved, and that, in

¹²⁷ Ante, p. 296.

cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.¹²⁸ Thus, by reason of the statute, the directors may be held when they knowingly violate or permit the violation of the provisions of the act in respect to excessive loans,¹²⁹ the increase of the capital,¹³⁰ the making of reports of the bank's financial condition,¹³¹ and the like.

This statutory liability of the directors is not exclusive of the common-law liability. But the act imposes upon directors duties which would not rest upon them at common law, and the section which makes them liable for losses resulting from the violation of duties expressly imposed, and which thus com-

¹²⁸ Rev. St. U. S. § 5239 (U. S. Comp. St. 1901, p. 3515).

¹²⁹ *Witters v. Sowles* (C. C.) 43 Fed. 405; *City Nat. Bank of Mangum v. Crow*, 27 Okl. 107, 111 Pac. 210. Cf. *Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 253, 254; *Cent. Dig.* §§ 944-949.

¹³⁰ *Cockrill v. Abeles*, 86 Fed. 505, 30 C. C. A. 223. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 253; *Cent. Dig.* §§ 944-949.

¹³¹ *Yates v. Jones Nat. Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002.

Directors may be liable to a common-law action of deceit for false representations. *Prescott v. Haughey* (C. C.) 65 Fed. 653. Cf. *Yates v. Jones Nat. Bank*, *supra*; *Merchants' Nat. Bank v. Armstrong* (C. C.) 65 Fed. 932.

Directors who have attested to be correct an official report of the bank's condition, which included, at their full face, as part of the bank's resources, assets which they had been informed by the comptroller were doubtful, and for the collection, or removal from the bank, of which immediate steps should be taken, are liable to one who, on the strength of the report, bought stock of the bank, for the depreciation thereof by reason of the shrinkage in the value of the specific assets, but not for its depreciation from impairment, then unknown to the directors, of other assets. *Taylor v. Thomas*, 124 App. Div. 53, 108 N. Y. Supp. 454, affirmed 195 N. Y. 590, 89 N. E. 1113. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 253; *Cent. Dig.* §§ 944-949.

prehends all the express commands to do and not to do, as to directors, affords the exclusive rule by which to measure the right to recover damages therefor. "That the words 'shall knowingly violate, or knowingly permit,' * * * were intended to express the rule of conduct which the statute established as a prerequisite to the liability for a violation of the express provisions of the title relating to national banks, is additionally shown by the oath which a director is required to take, wherein he swears that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of the association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title. * * * In other words, as the statute does not relieve the directors from the common-law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand, the statute imposes certain express duties, and makes a knowing violation of such commands the test of civil liability, the oath in this regard also corresponds to the requirements of the statute by the promise not to knowingly violate, or willingly permit to be violated, any of the provisions of this title."¹³²

Enforcement—Common-Law Liability

For a violation of the common-law liability of the directors and other officers, whereby the corporation has suffered loss, the right of action is primarily in the corporation, for the in-

¹³² *Yates v. Jones Nat. Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002. See, also, *Yates v. Utica Bank*, 206 U. S. 181, 27 Sup. Ct. 646, 51 L. Ed. 1015; *Allen v. Luke* (C. C.) 163 Fed. 1018.

Directors, who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the comptroller, made and published conformably to Rev. St. U. S. § 5211 (U. S. Comp. St. 1901, p. 3498), cannot be held civilly liable to any one deceived to his injury by such report, since the exclusive test of such liability is furnished by section 5239 (page 3515), which makes a knowing violation of the provisions of the title a prerequisite to such liability. *Yates v.*

jury to it, and not in the stockholders.¹³³ And if a receiver has been appointed, the right of action is primarily in the receiver.¹³⁴ But if the bank is still in the control of the directors, and they cannot or will not institute suit in the name of the corporation, the stockholders may sue in their own names, making the corporation defendant; and if stockholders are so numerous as to render it inconvenient to bring them all before the court, a part may file a bill in equity in behalf of themselves and all other stockholders similarly situated.¹³⁵ Where the bank is insolvent, and the bank's officers, the receiver, and the comptroller of the currency have all refused to bring suit, a stockholder as a representative stockholder, may in a state court bring suit against the directors or other officers to recover money lost through their negligence or dishonesty.¹³⁶ And it seems that creditors of the bank, if it were insolvent, in a proper case could enforce the liability to the bank.¹³⁷

Statutory Liability

As in the case of the common-law liability, the right of action against the directors upon the statutory liability for a loss

Jones Nat. Bank, *supra*. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 253, 254; *Cent. Dig.* §§ 944-957.

¹³³ Conway v. Halsey, 44 N. J. Law, 462; ante, p. 304. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹³⁴ Howe v. Barney (C. C.) 45 Fed. 668; Movius v. Lee (C. C.) 30 Fed. 298; Cockrill v. Abeles, 86 Fed. 505, 30 C. C. A. 223. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹³⁵ Ackerman v. Halsey, 37 N. J. Eq. 356. See Brinckerhoff v. Bostwick, 88 N. Y. 52. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹³⁶ Ex parte Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782.

It is not necessary to allege a direction from the comptroller, or a demand upon him and refusal to direct the receiver to sue. Brinckerhoff v. Bostwick, 88 N. Y. 52. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹³⁷ Ante, p. 304.

resulting to the bank or its stockholders or creditors is primarily in the bank.¹³⁸ If a receiver has been appointed, he may sue.¹³⁹ A creditor of an insolvent bank, which has passed into the hands of a receiver, cannot maintain an action, since the liability is an asset of the bank, and must be enforced by the receiver for the benefit of all the creditors.¹⁴⁰ It seems that a representative stockholder may sue if the association will not,¹⁴¹ and perhaps that a creditor may in proper case sue when the association is insolvent.¹⁴²

The right of action is for a tort, and comes within the com-

¹³⁸ *National Bank of Commerce v. Wade* (C. C.) 84 Fed. 10. See, also, *Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹³⁹ *Cockrill v. Abeles*, 86 Fed. 505, 30 C. C. A. 223; *Cockrill v. Cooper*, 86 Fed. 10, 29 C. C. A. 529; *Allen v. Luke* (C. C.) 141 Fed. 694. See, also, *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹⁴⁰ *Bailey v. Mosher*, 63 Fed. 488, 11 C. C. A. 304. But see *Boyd v. Schneider*, 131 Fed. 223, 65 C. C. A. 209, in which it was held that depositors of an insolvent bank could maintain a suit in equity against its directors for negligently permitting its officers to loan the bank's assets in violation of the act, on the ground that such conduct was a breach of the bank's implied contract with the depositors that the bank would use such deposits and its other assets in conformity with the safeguards provided by law. The court said that the question was not whether the amount received might not become an asset of the bank, but whether the depositors might not enforce the liability as a right special to them, a right growing out of the contract of deposit, and therefore not common to stockholders and other creditors. Upon this ground it is difficult to reconcile the decision with the current of authority, although it is reconcilable on the ground that the receiver, as well as the comptroller, had been asked and had refused to bring suit against the directors. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹⁴¹ *Ante*, p. 304.

¹⁴² *Ante*, p. 304. See *Boyd v. Schneider*, 131 Fed. 223, 65 C. C. A. 209. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

non-law definition of an action on the case.¹⁴³ But a suit is cognizable in equity when the remedy at law is not complete or adequate, as where the transactions are complicated and the conversion of securities into money is required before the extent of the liability can be ascertained.¹⁴⁴

Whether, in a suit to enforce the statutory liability of directors, the forfeiture of the bank's charter in a suit brought by the comptroller is a condition precedent, is a question on which the cases are in conflict. On the one hand, it has been said that the cause of action is purely statutory, and that the

¹⁴³ *Cockrill v. Butler* (C. C.) 78 Fed. 679. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹⁴⁴ *National Bank of Commerce v. Wade* (C. C.) 84 Fed. 10. See, also, *In re Wright* (D. C.) 177 Fed. 578.

A court of equity has jurisdiction of a suit against the directors for excessive loans, under Rev. St. U. S. §§ 5200, 5239 (U. S. Comp. St. 1901, pp. 3494, 3515), where the suit is against a large number of directors, whose terms of service were not identical, where the excessive loans were inaugurated by one set of directors, and continued, renewed, or enlarged by another, and where the directors were also charged with a violation of section 5204 (page 3495), in declaring dividends. *Cockrill v. Cooper*, 86 Fed. 10, 29 C. C. A. 529.

The directors are not trustees of an express trust, with respect to the property of the bank, but of an implied or resulting trust created by operation of the law upon their official relation to the bank; and the statute of limitations and the doctrine of laches may be invoked in their defense, when sued for a breach of such trust. Such an action is maintainable either at law or in equity, and a court of equity will follow the statute of limitations, unless unusual or extraordinary circumstances render its application inequitable in a particular case. *Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402.

Where a bank suffered losses through the continued negligence of its directors, which was unknown to its creditors, and such directors remained in control until the appointment of a receiver on the bank's insolvency, a court of equity will entertain a suit to charge them with personal liability, notwithstanding the fact that an action at law to recover for their wrongful acts would be barred by limitation under the laws of the state. *Rankin v. Cooper* (C. C.) 149 Fed. 1010. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

statute makes an adjudication of the forfeiture in a suit by the comptroller a condition precedent.¹⁴⁵ On the other hand, it has been said, in cases involving loans in excess of the authorized amount, that the directors are liable at common law for unauthorized acts, as well as for failure to exercise proper diligence, when such acts result in damage to the corporation, and that the statute as a whole prescribes a standard of duty without creating a new cause of action, or altering the foundation upon which the liability of directors for neglect or wrongful acts ultimately rests, and that Congress did not intend to declare that directors should only be subject to suit for losses through excessive loans in those cases where the charter has first been forfeited at the instance of the comptroller. It is also said that such an interpretation of the statute, to the extent that it would prevent a bank, while a going concern, from maintaining a suit against directors for losses sustained by acts confessedly unlawful, was not intended.¹⁴⁶

¹⁴⁵ See *Welles v. Graves* (C. C.) 41 Fed. 459; *Hayden v. Thompson* (C. C.) 67 Fed. 273; *Gerner v. Thompson* (C. C.) 74 Fed. 125. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

¹⁴⁶ *Cockrill v. Cooper*, 86 Fed. 7; 29 C. C. A. 529. See, also, *Stephens v. Overstolz* (C. C.) 43 Fed. 771; *National Bank of Commerce v. Wade* (C. C.) 84 Fed. 10; *Allen v. Luke* (C. C.) 141 Fed. 694.

So far as the cause of action is for knowingly violating a command of the act, it seems to be purely statutory. *Yates v. Jones Nat. Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002.

Nevertheless it appears reasonable to construe the provision that a violation must be adjudged at the suit of the comptroller as applying only to a forfeiture, and not as requiring that a violation shall be so adjudged and a forfeiture declared as a condition precedent to an action against a director for damages sustained by the association, its shareholders, or any other person. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 254; *Cent. Dig.* §§ 950-957.

CRIMINAL LIABILITY OF OFFICERS

106. The National Bank Act denounces as crimes certain acts on the part of the officers, clerks and agents of national banks—among such acts being the false certification of checks; the embezzlement, abstraction, and willful misapplication of the bank's funds; the unauthorized issue of the notes of the association, or of certificates of deposit; the unauthorized drawing, making, or assignment of certain instruments, etc.; and the making of certain false entries.

Wrongfully Certifying Check

The National Bank Act ¹⁴⁷ makes it unlawful for any officer, clerk, or agent of any association to certify any check drawn upon the association, unless the person or association drawing the check had on deposit with the association, at the time of drawing it, an amount of money equal to the amount specified in the check, and provides that any officer, clerk, or agent of such association, who shall willfully violate the provisions of the section, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered in the credit of the dealer upon the books of the association, shall be guilty of a misdemeanor.¹⁴⁸

¹⁴⁷ Rev. St. U. S. § 5208; Act July 12, 1882, c. 290, § 13, 22 Stat. 166 (U. S. Comp. St. 1901, p. 3497).

¹⁴⁸ Section 5208 does not create a criminal offense, but, read with Act July 12, 1882, c. 290, 22 Stat. 166 (U. S. Comp. St. 1901, p. 3497), the two create one offense. *United States v. Heinze* (C. C.) 161 Fed. 425.

To constitute a willful violation, a wrongful intent is essential; and an officer certifying, believing in good faith, and having reasonable grounds, that the drawer had a sufficient deposit, could not be

Embezzlement, etc.

The act ¹⁴⁹ provides that every president, director, cashier, teller, clerk, or agent of any association, who embezzles, ¹⁵⁰ ab-

convicted, though the account was overdrawn. *Spurr v. United States*, 174 U. S. 728, 19 Sup. Ct. 812, 43 L. Ed. 1150.

Defendant can show a positive agreement on the part of the officers that the overdraft caused by the certified check should be practically treated as a loan from day to day, secured by collateral, and that before issue of the check an ample amount of cash was deposited. *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214.

Knowledge that the false certification is in violation of the law is not essential; the intent being imported from knowledge of the facts. *Chadwick v. United States*, 141 Fed. 225, 72 C. C. A. 343.

While it is a settled rule that an indictment for conspiracy will not lie where a plurality of agents is logically necessary to complete the crime which it was the object of the conspiracy to commit, such rule does not apply to an indictment under Rev. St. U. S. § 5440 (U. S. Comp. St. 1901, p. 3676), for a conspiracy between the defendant, who had no official connection with a national bank, and an officer of such bank, to violate Rev. St. U. S. § 5208 (U. S. Comp. St. 1901, p. 3497), by causing a check of defendant drawn on the bank to be certified by such officer when defendant did not have a sufficient amount on deposit to pay the same. *Chadwick v. United States*, 141 Fed. 225, 72 C. C. A. 343.

Sufficiency of indictment, see *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; *United States v. Potter* (C. C.) 56 Fed. 83; *United States v. Heinze* (C. C.) 161 Fed. 428. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 256; *Cen. Dig.* §§ 958-967.

¹⁴⁹ Rev. St. U. S. § 5209 (U. S. Comp. St. 1901, p. 3497).

¹⁵⁰ Embezzlement is a word of technical meaning. It involves the unlawful conversion by an officer, clerk, or agent of the bank of moneys, funds, or credits of the bank intrusted to him. *United States v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664; *United States v. Youtsey* (C. C.) 91 Fed. 864. See, also, *Claassen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; *McKnight v. United States*, 115 Fed. 972, 54 C. C. A. 358. "Misapplication" is broader, and covers "embezzlement." *Jewett v. United States*, 100 Fed. 832, 840, 41 C. C. A. 88, 53 L. R. A. 568.

As to the distinction between embezzlement, abstraction, and willful misapplication, see *United States v. Harper* (C. C.) 33 Fed. 471;

stracts,¹⁵¹ or willfully misapplies¹⁵² any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of

United States v. Youtsey (C. C.) 91 Fed. 864; United States v. Breeze (D. C.) 131 Fed. 915. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 256; *Cent. Dig.* §§ 958-967.

¹⁵¹ "Abstract" * * * is not a word of settled technical meaning, like the word 'embezzle.' * * * It is a word, however, of simple, popular meaning, without ambiguity. It means to take or withdraw from; so that to abstract the funds of the bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. This, of course, does not embrace every element of that which, under this section of the statute, is made the offense of criminally abstracting the funds of the bank. To constitute that offense, within the meaning of the act, it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with the intent to injure or defraud it, or some other company or person, or to deceive some officer of the association, or an agent appointed to examine its affairs." United States v. Northway, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 256; *Cent. Dig.* §§ 958-967.

¹⁵² "Willful misapplication" * * * means something different from the acts of official maladministration referred to in section 5239, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3515), and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company, other than the association, with intent to injure and defraud the association, or some other body corporate or some natural person, and it must be charged in the indictment that such misapplication was so made; and where the counts in an indictment charge the fraudulent purchase by the defendant, as president, of certain shares of stock 'in trust for the use of said association, and which shares of stock were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith,' they do not charge a criminal misapplication of funds, but a mere maladministration of the affairs of the bank." United States v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520. See, also, United States v. Britton, 108 U. S. 193, 2 Sup. Ct. 526, 27 L. Ed. 701; United States v. Northway, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664; Batchelor v. United States, 156 U. S. 426, 15 Sup. Ct. 466, 39 L. Ed. 478.

As the procuring of a dividend by a banking association, when

the association,¹⁵³ or who, without such authority, issues or puts forth any certificates of deposits, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or makes any false entry in any book, report, or statement of

there are no net profits to pay it, is not a willful misapplication of the moneys and funds of the association, under section 5209 (page 3497), a conspiracy to commit such act is not made punishable by section 5440 (page 3676). *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698.

Persons not officers or agents may be aiders and abettors. *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481. See, also, *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830.

A charge that, if defendant "either embezzled or willfully misapplied" the funds or credits of the bank, "whereby, as a necessary, natural, or legitimate consequence, its capital was reduced, or placed beyond the control of the directors, or its ability to meet its engagements or obligations, or to continue its business, was lessened or destroyed, the intent to injure or defraud the bank may be presumed," is correct, as a statement of law. *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624.

An indictment for the willful misapplication of funds of a bank by an officer, with intent to defraud, by receiving and discounting with its money an absolutely unsecured promissory note of a named partnership, whereby the proceeds of the discount of the note were wholly lost to the bank, need not charge a conversion by the recipient of the proceeds of the discount, provided it does allege a conversion by such officer. *United States v. Heinze*, 218 U. S. 532, 31 Sup. Ct. 98, 54 L. Ed. 1139.

The misappropriation of the funds of a bank by an officer in the honest exercise of official discretion, in good faith, without fraud, for the advantage, or supposed advantage, of the bank, is not punishable; but if official action be taken, not in the honest exercise of discretion, in bad faith, for personal advantage, and with fraudulent intent, it is punishable. *United States v. Fish* (C. C.) 24 Fed. 585.

The fact that the officers of a bank which has gone into liquidation occupy the relation of trustees for creditors does not preclude

¹⁵³ See *United States v. Harper* (C. C.) 33 Fed. 471, 476. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 256; *Cent. Dig.* §§ 958-967.

the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association,¹⁵⁴ and every person who with like intent aids

the president, who has been appointed as agent by the shareholders, to assist in the liquidation, from being prosecuted under Rev. St. U. S. § 5209, for willfully misapplying the assets of the association. *Jewett v. United States*, 100 Fed. 832, 41 C. C. A. 88, 53 L. R. A. 568.

The offense may be consummated by giving fraudulent credits, and the transfer of the same by checks. *Rieger v. United States*, 107 Fed. 917, 47 C. C. A. 61.

The discounting by the president with the funds of the bank of commercial paper known by him to be worthless or fictitious, for the benefit of an insolvent corporation of which he is an officer, and with intent to injure and defraud the bank, is a willful misapplication of its funds. *Flickinger v. United States*, 150 Fed. 1, 79 C. C. A. 515.

The officers possess no authority to permit a conversion of the bank's funds to the use of one of them; nor is it a defense that the money is refunded. *United States v. Morse* (C. C.) 161 Fed. 429.

For an officer, who is also a promoter of various enterprises, to obtain the funds of the bank on the security of unmarketable bonds of his own enterprises, at the risk of the interest of the bank, is a misapplication of the funds, which cannot be covered up by entering the transactions on the books as loans and investments. *Walsh v. United States*, 174 Fed. 616, 98 C. C. A. 461. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 256; *Cent. Dig.* §§ 958-967.

¹⁵⁴ The assistant cashier of a bank is indictable for making a false entry in a report to the comptroller, although he is not one of the officers authorized by Rev. St. U. S. § 5211 (U. S. Comp. St. 1901, p. 3498), to make such a report; for he may be regarded as within the category of "clerk or agent," within the terms of section 5209 (page 3497). The president and assistant cashier are indictable as principals for making a false entry in a report, although neither of them actually signed or attested the report. *Cochran v. United States*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

Where a transaction by an officer, made with intent to defraud, is entered upon a deposit slip, the entry of the contents of such slip upon the books of the bank, by the officer personally or by his direction, is the making of a "false entry." *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624.

The statute which punishes false entries to deceive agents ap-

or abets any officer, clerk, or agent in violation of this section, shall be deemed guilty of a misdemeanor.

FORFEITURE AND DISSOLUTION

107. A national banking association forfeits its franchise if its officers knowingly violate any provisions of the act, and may be dissolved when such violation is adjudged by a proper court.

If the directors of any association knowingly violate, or permit any of the officers, agents, or servants of the association to violate, any of the provisions of the act, all the rights, privileges, and franchises of the association shall be thereby forfeited. Before the association shall be declared dissolved, how-

pointed under section 5240, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3516), to examine the affairs of national banking associations, refers to any entries made with that intent, whether before or after the appointment of the agent. *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520.

The comptroller of the currency is an agent within the provision that every officer who makes any false entry in a report to any agent appointed to examine the affairs of such association shall be guilty of a misdemeanor, and it is immaterial that Rev. St. U. S. § 5240 (U. S. Comp. St. 1901, p. 3516), confers power upon him to appoint suitable agents to examine the affairs of such banks. Intent to injure a bank by a false report to the comptroller is not negatived as matter of law by the fact that the report showed the bank to be in better condition than it really was. *United States v. Corbett*, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. 173.

The section includes a false entry in a report voluntarily made, if with the requisite unlawful intent. *Harper v. United States*, 170 Fed. 385, 95 C. C. A. 555. See, also, *Bacon v. United States*, 97 Fed. 35, 38 C. C. A. 37.

Entries in the books of a bank showing loans to persons named on the security of stocks deposited as collateral, when in fact the transactions were purchases of the stock by the bank, the supposed borrowers being merely dummies, wholly irresponsible for the amount of the notes which they gave, without any intention of

ever, the violation shall be determined and adjudged by a proper court of the United States, in a suit brought for that purpose by the comptroller of the currency in his own name.¹⁵⁵

VOLUNTARY LIQUIDATION

108. A national bank may go into voluntary liquidation and be closed by vote of the stockholders, upon complying with the requirements of the act.

Any association may go into liquidation and be closed by a vote of two-thirds of its stock. Notice of the fact must be certified to the comptroller of the currency, and publication must be made that the association is closing up its affairs, and

paying the same or any knowledge of the actual transactions, were false entries, and, when made by the direction of an officer of the bank who conducted the transactions, a jury was justified in finding that they were fraudulent and made with intent to deceive the bank examiner and his agents. The fact that entries in a report made by a bank to the comptroller accurately state the facts as shown by the books does not prevent them from being false, where the books themselves do not correctly show the actual transactions or condition of the bank. *Morse v. United States*, 174 Fed. 539, 98 C. C. A. 321. See, also, *Hayes v. United States*, 169 Fed. 101, 94 C. C. A. 449. Cf. *Twining v. United States*, 141 Fed. 41, 72 C. C. A. 529. See, generally, *Allis v. United States*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; *Scott v. United States*, 130 Fed. 429, 64 C. C. A. 631; *Richardson v. United States*, 181 Fed. 1, 104 C. C. A. 69. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 256; *Cent. Dig.* §§ 958-967.

¹⁵⁵ Rev. St. U. S. § 5239 (U. S. Comp. St. 1901, p. 3515); ante, p. 398. Sufficiency of information for forfeiture. *Trenholm v. Commercial Nat. Bank* (C. C.) 38 Fed. 323. The forfeiture comes within Rev. St. U. S. § 1047 (U. S. Comp. St. 1901, p. 727), limiting suits for a penalty or forfeiture to five years. *Welles v. Graves* (C. C.) 41 Fed. 460.

Until the forfeiture is determined, the bank may do business. *Stephens v. Monongahela Nat. Bank*, 88 Pa. 157, 32 Am. Rep. 438. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 284; *Cent. Dig.* §§ 1083-1087.

notifying note holders and other creditors to present their claims, and a deposit must be made with the treasurer of the United States sufficient to redeem all outstanding circulation.¹⁵⁶ The association continues to exist, as a person, in law, capable of suing and being sued, for the purpose of winding up its affairs.¹⁵⁷ After the bank has gone into liquidation, its officers have no authority, unless such authority is expressly conferred by the stockholders, to bind them by the transaction of any business except that necessarily involved in winding up its affairs.¹⁵⁸ Having ceased to do business as a going concern, it is not required to register a transfer of its stock and to issue a new certificate.¹⁵⁹ The enforcement of the liabilities of the stockholders has already been considered.¹⁶⁰ An association which is winding up its affairs may consolidate with another association.¹⁶¹

¹⁵⁶ Rev. St. U. S. §§ 5220-5224 (U. S. Comp. St. 1901, pp. 3503, 3504).

As to rights of minority stockholders, see *Green v. Bennett* (Tex. Civ. App.) 110 S. W. 108; *Watkins v. National Bank of Lawrence*, 51 Kan. 254, 32 Pac. 914. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 281; *Cent. Dig.* §§ 1075-1079.

¹⁵⁷ *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693; *Pritchard v. Barnes*, 101 Wis. 86, 76 N. W. 1106; *Merchants' Nat. Bank of Minneapolis v. Gaslin*, 41 Minn. 552, 43 N. W. 483. Contra: *Hodgson v. McKinstrey*, 3 Kan. App. 412, 42 Pac. 929. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 281; *Cent. Dig.* §§ 1075-1079.

¹⁵⁸ *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 262; *Cent. Dig.* §§ 1001-1006.

¹⁵⁹ *Muir v. Citizens' Nat. Bank*, 39 Wash. 57, 80 Pac. 1007. See, also, *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 281; *Cent. Dig.* §§ 1075-1079.

¹⁶⁰ Ante, p. 395.

¹⁶¹ Rev. St. U. S. § 5223 (U. S. Comp. St. 1901, p. 3504). See *Bonnet v. First Nat. Bank* (Tex. Civ. App.) 60 S. W. 325; *Green v.*

INVOLUNTARY LIQUIDATION

109. Whenever any association is dissolved and its franchises are declared forfeited for violation of the act, or whenever any creditor obtains judgment against any association in a court of record, and makes application accompanied by a certificate of the clerk of the court stating that such judgment has been rendered and has remained unpaid for 30 days, and whenever the comptroller of the currency shall have become satisfied of the insolvency of an association, he may, after due examination of its affairs, in either case, appoint a receiver to wind up its affairs and enforce the liability of the stockholders. Authority is also conferred upon the comptroller to appoint such a receiver for failure of an association to comply with certain other requirements of the act. When the receiver has paid the debts of the association, with certain exceptions, by vote of the stockholders an agent may be substituted for the receiver to wind up the affairs of the association.

Appointment of Receiver

The act as originally passed did not provide for a receivership upon the insolvency of the association. It provided for the appointment of a receiver by the comptroller to liquidate the affairs of an association upon its refusal to pay its circulating notes,¹⁶² and also in the following cases: For the reduction of its stock below the required minimum, deficiency in the required surplus, failure to maintain a proper reserve, failure to redeem or select an agent for the redemption of its cir-

Bennett (Tex. Civ. App.) 110 S. W. 108. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 281; *Cent. Dig.* §§ 1075-1079.

¹⁶² Rev. St. U. S. § 5234 (U. S. Comp. St. 1901, p. § 3507).

culating notes, holding its own stock for six months, failure to pay up its capital stock and refusal to go into liquidation, and improperly certifying checks.¹⁶³

In view of these and other provisions of the act, it was held that national banks were not subject to the bankrupt act of 1867, and that bankruptcy courts had no jurisdiction, as against such associations.¹⁶⁴ By the present bankruptcy act they are expressly excepted from the class of persons who may be adjudged bankrupts.¹⁶⁵ It was held, however, that the bank act did not oust the courts of their power to appoint a receiver in cases not within the special provisions of the act, as upon a creditors' bill.¹⁶⁶

By a later enactment authority was conferred upon the comptroller to appoint a receiver to close up any association, after due examination of its affairs: (1) When the association is dissolved and its franchises are forfeited for violation of the provisions of the act; (2) when a creditor has obtained a judgment against the association which has been unpaid for 30

¹⁶³ Rev. St. U. S. §§ 5141, 5151, 5191, 5195, 5201, 5205, 5208 (U. S. Comp. St. 1901, pp. 3462, 3465, 3486, 3492, 3494, 3495, 3497).

¹⁶⁴ *In re Manufacturers' Nat. Bank*, 5 Biss. 499, Fed. Cas. No. 9,051. See, also, *Cook County Nat. Bank v. United States*, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 73; *Cent. Dig.* § 17.

¹⁶⁵ Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309).

¹⁶⁶ *Irons v. Manufacturers' Nat. Bank*, Fed. Cas. No. 7,068, 6 Biss. 301; *Wright v. Merchants' Nat. Bank*, Fed. Cas. No. 18,084, 1 Flip. 568.

Under act June 3, 1864, c. 106, 13 Stat. 99, authorizing the formation of national banks, a federal court sitting in equity had jurisdiction in a proper case to appoint a receiver to liquidate its obligations, and to authorize him to collect and to enforce by action the liability of the shareholders of the bank under section 12 of the act (section 5151, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3465]). *King v. Pomeroy*, 121 Fed. 287, 58 C. C. A. 209. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

days; and (3) when the comptroller becomes satisfied of the insolvency of the association.¹⁶⁷

The comptroller may appoint a receiver for an insolvent bank, or make a ratable assessment on the stockholders, without a prior judicial determination of the necessity for a receiver or of the existence of the liabilities of the bank.¹⁶⁸ The act, empowering the comptroller to appoint such receiver and to make such assessments, does not vest in him a judicial power, in violation of the constitution.¹⁶⁹ The receiver is the agent of the United States, and not an agent or officer of any court.¹⁷⁰ The power of appointment by the comptroller carries with it the power of removal.¹⁷¹

Effect of Appointment

The appointment of receiver supersedes the powers of the directors to exercise the incidental powers necessary to carry on the business of banking; but the corporation is not dissolved, and the bank may be sued and judgment may be recovered against it, notwithstanding the receivership.¹⁷²

¹⁶⁷ Act June 30, 1876, c. 156, § 1, 19 Stat. 63 (U. S. Comp. St. 1901, p. 3509).

¹⁶⁸ *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598.

His power to appoint, when satisfied of the bank's insolvency, is discretionary, and his decision as to the insolvency not open to review, and the power may be exercised, though the bank has gone into voluntary liquidation. *Washington Nat. Bank v. Eckels* (C. C.) 57 Fed. 870. See, also, *Elwood v. First Nat. Bank of Greenleaf*, 41 Kan. 475, 21 Pac. 673. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

¹⁶⁹ *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

¹⁷⁰ *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 209, 41 L. Ed. 598; *Price v. Abbott* (C. C.) 17 Fed. 506. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

¹⁷¹ See *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

¹⁷² *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed.

Powers and Duties of Receiver

It is provided that the receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of the association, collect the debts, dues, and claims belonging to it, and, upon order of a court of record of competent jurisdiction, may sell and compound all bad or doubtful debts, and, on like order, may sell all the real and personal property of the association, on such terms as the court may direct, and may, if necessary to pay the debts of the association, enforce the individual liability of the stockholders.¹⁷³ The provision that the receiver shall act under the direction of the comptroller means that he shall be subject to such direction, and not that he shall be obliged to get special authority for every act that he does in collecting the assets and debts.¹⁷⁴ The appointment vests in the receiver all the assets of the bank, to be converted into money and distributed among the creditors; but, of course, he acquires no right to property in the custody of the bank which it does not own,¹⁷⁵ and he takes the property of the bank subject to existing liens, incumbrances, and defens-

840; *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595; *National Pahquioque Bank v. First Nat. Bank of Bethel*, 36 Conn. 325, 4 Am. Rep. 80.

The statute of limitations is not set in motion against a certificate of deposit, not due until demand, by the appointment of a receiver. *Riddle v. First Nat. Bank* (C. C.) 27 Fed. 503. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

¹⁷³ Rev. St. U. S. § 5234 (U. S. Comp. St. 1901, p. 3507). Enforcement of stockholders' liability, ante, p. 392. As to power of receiver to purchase property, in order to protect the trust estate, in certain cases, see Act March 29, 1886, c. 28, 24 Stat. 8 (U. S. Comp. St. 1901, p. 3514).

¹⁷⁴ *National Bank of Metropolis v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554; *Turner v. Richardson*, 180 U. S. 87, 21 Sup. Ct. 295, 45 L. Ed. 438. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

¹⁷⁵ *Corn Exchange Bank of Chicago v. Blye*, 101 N. Y. 303, 4 N. E. 635. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

es.¹⁷⁶ It is only when debts are bad or doubtful, and it is deemed expedient to sell or compound them, that the court may make an order respecting them.¹⁷⁷ The receiver cannot sell or compound debts or sell property without an order of court, nor upon terms in conflict therewith, and persons dealing with him are charged with notice of his authority.¹⁷⁸ But, by filing a petition for leave to compound a debt or to sell property, the receiver does not place the assets in the custody of the court, as in the case of a receiver appointed by the court.¹⁷⁹

Actions by Receiver

For the purpose of collecting the debts and claims belonging to the bank, the receiver may, of course, bring suit, and no authorization by the comptroller is necessary.¹⁸⁰ He may sue in his own name as receiver, or in the name of the bank for his

¹⁷⁶ Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; Casey v. La Société de Credit Mobilier, Fed. Cas. No. 2,496, 2 Woods, 77; Hatch v. Johnson Loan & Trust Co. (C. C.) 79 Fed. 828. As to set-off, post, p. 424. See "*Banks and Banking*," Dec. Dig. (Key No.) § 287; Cent. Dig. §§ 1089-1127.

¹⁷⁷ Price v. Yates, Fed. Cas. No. 11,418; In re Earle (C. C.) 92 Fed. 22. See "*Banks and Banking*," Dec. Dig. (Key No.) § 287; Cent. Dig. §§ 1089-1127.

¹⁷⁸ Case v. Small (C. C.) 10 Fed. 722; In re Earle (C. C.) 92 Fed. 22; Ellis v. Little, 27 Kan. 707, 41 Am. Rep. 434. Cf. McCartney v. Earle, 115 Fed. 462, 53 C. C. A. 392.

He may, upon sufficient consideration, extend the time of payment of a debt, if he thereby secures additional security. People's State Bank of Lakota v. Francis, 8 N. D. 369, 79 N. W. 853.

The district court is a court of competent jurisdiction. In re Platt, Fed. Cas. No. 11,211, 1 Ben. 534. See "*Banks and Banking*," Dec. Dig. (Key No.) § 287; Cent. Dig. §§ 1089-1127.

¹⁷⁹ Ex parte Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782. See "*Banks and Banking*," Dec. Dig. (Key No.) § 287; Cent. Dig. §§ 1089-1127.

¹⁸⁰ National Bank of Metropolis v. Kennedy, 17 Wall. 19, 21 L. Ed. 554; Turner v. Richardson, 180 U. S. 87, 21 Sup. Ct. 295, 45 L. Ed. 438; post, p. 432.

A bill to recover dividends illegally paid may be brought without

use.¹⁸¹ It is sufficient for the receiver to allege his appointment in general terms, and he need not specifically aver each and every thing provided by the act as the ground of appointing a receiver. "The debtors of a bank, when sued by a receiver, cannot inquire into the legality of his appointment. It is sufficient * * * that he is appointed, and is receiver in fact. As to debtors, the action of the comptroller in making the appointment is conclusive, until set aside on the application of the bank."¹⁸² Having the legal title to the property covered by his appointment, he may maintain an action in his own name in a state court.¹⁸³

Proof and Payment of Claims and Distribution

It is provided that the comptroller, after appointing the receiver, shall give published notice, calling on all persons who may have claims against the association to present them and make legal proof, and that from time to time, after provision for refunding to the United States any deficiency in redeeming the notes of the association, the comptroller shall make a ratable dividend of the money paid over to him by the receiver upon all claims proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of the association are paid over to him, shall make further dividends on claims previously proved or adjudicated, and

order from the comptroller. *Hayden v. Thompson*, 71 Fed. 61, 17 C. C. A. 592. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1104.

¹⁸¹ *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *National Bank of Metropolis v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554; *Stanton v. Wilkeson*, Fed. Cas. No. 13,299, 8 Ben. 357. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1104.

¹⁸² *Cadle v. Baker*, 20 Wall. 650, 22 L. Ed. 448.

Evidence of appointment, see *Platt v. Beebe*, 57 N. Y. 339. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1104.

¹⁸³ *Fish v. Olin*, 76 Vt. 120, 56 Atl. 533. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1104.

that the remainder of the proceeds shall be paid over to the shareholders.¹⁸⁴

A claim proved to the satisfaction of the comptroller is placed upon the same footing as if it were reduced to judgment.¹⁸⁵ But a claim disallowed by him may be prosecuted in a state court or other court having jurisdiction of such cases.¹⁸⁶ In such case, if the claim is established, since the assets are within the control of the comptroller, the decree should direct that the claim as established be certified to him, to be paid in due course of administration, and not direct payment of a dividend by the receiver.¹⁸⁷ Dividends are to be paid ratably

¹⁸⁴ Rev. St. U. S. §§ 5235, 5236 (U. S. Comp. St. 1901, p. 3508).

Bonds deposited to secure the circulation are held by the government as trustee, and the surplus of the proceeds, after payment of the notes, cannot be set off by the government against an unsecured deposit, but must be distributed ratably among the creditors. *Cook County Nat. Bank v. United States*, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

¹⁸⁵ See *National Bank of Commonwealth v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. Ed. 176. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

¹⁸⁶ *Bank of Bethel v. Pahquoique Bank*, 14 Wall. 383, 20 L. Ed. 840.

While the receiver may interpose and become a party, he is not a necessary party, and is bound by a judgment against the bank. *Denton v. Baker*, 79 Fed. 189, 24 C. C. A. 476.

One who takes dividends on a claim allowed is not estopped to sue on disputed claims. *Chemical Nat. Bank of Chicago v. World's Columbian Exposition*, 170 Ill. 82, 48 N. E. 331.

A claim for rent, which was due nine days before suspension, is an existing demand, which may be proved. *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

¹⁸⁷ *Merrill v. First Nat. Bank*, 75 Fed. 148, 21 C. C. A. 282; *Wolf v. National Bank of Illinois*, 178 Ill. 85, 52 N. E. 896. See, also, *Richardson v. Louisville Banking Co.*, 94 Fed. 442, 36 C. C. A. 307. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

—that is, proportionally—on all claims against the bank previously proved and allowed by the comptroller or established by the adjudication of the court and the payment of dividends must be based on the amount due on the adjudicated claim at the date of the failure, and not on the amount due when the claim is adjudicated.¹⁸⁸ A secured creditor is entitled to prove and receive dividends on the full amount due him at the date of the insolvency, without regard to his collaterals or any collections he may make upon them, provided the sums received by way of dividends and from the collaterals do not exceed the entire debt.¹⁸⁹

Agent When Receiver has Paid Debts

It is provided that when the comptroller has paid the debts of the bank, not including those of creditors who are shareholders, and all expenses, and the redemption of the bank's circulating notes has been provided for, an agent may be substituted for the receiver, by a vote of the majority of the stock, to wind up the bank's affairs, with power to dispose of the assets, to sue and be sued, and to sell, compromise, or compound the debts with the consent of the circuit or district court for the district where the business of the bank is carried on, to which he shall account and which shall settle his accounts; the proceeds of the assets, after payment of expenses, to be distributed in repayment to the stockholders of any amounts paid in

¹⁸⁸ United States ex rel. White v. Knox, 111 U. S. 784, 4 Sup. Ct. 686, 28 L. Ed. 603; American Nat. Bank v. Williams, 101 Fed. 943, 42 C. C. A. 101. Allowance of interest on deposits, see National Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437, 24 L. Ed. 176. Interest as against stockholders, see Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. See "Banks and Banking," Dec. Dig. (Key No.) § 288; Cent. Dig. §§ 1105-1127.

¹⁸⁹ Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640. See, also, Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611; Chemical Nat. Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231. See "Banks and Banking," Dec. Dig. (Key No.) § 288; Cent. Dig. §§ 1105-1127.

by them upon assessments on stock made by the comptroller, and the balance to be paid ratably among the stockholders.¹⁹⁰

Such agent is not an officer of the court, although he is required to account to it.¹⁹¹ Suit may be brought against the agent by a creditor of the bank.¹⁹²

TRANSFERS AND PAYMENTS AFFECTED BY INSOLVENCY—PREFERENCES

110. Transfers, assignments, and payments by an association, after the commission of an act of insolvency, or in contemplation of insolvency, made with a view to prevent the application of its assets in the manner prescribed, or with a view to the preference of one creditor to another, except in payment of its circulating notes, are void. No attachment, injunction, or execution shall be issued against any association or its property, before final judgment in any suit, action, or proceeding in any state, county, or municipal court.

It is provided that all transfers of the notes, bonds, bills of exchange of any association, or deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either,

¹⁹⁰ Act June 30, 1876, c. 156, § 3, 19 Stat. 63, as amended by Act Aug. 3, 1892, c. 360, 27 Stat. 345, Act March 2, 1897, c. 354, 29 Stat. 600 (U. S. Comp. St. 1901, p. 3510).

¹⁹¹ *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1127.

¹⁹² *Barron v. McKinnon* (C. C.) 179 Fed. 759.

Where the receiver is replaced by an agent, it is proper to substitute the latter. *McConville v. Gilmour* (C. C.) 36 Fed. 277. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* §§ 1089-1105.

made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void, and, further, that no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court.¹⁹³

Insolvency means inability on the part of the bank to pay its obligations in the ordinary course of business.¹⁹⁴ An act of insolvency is any act which would be an act of insolvency on the part of an individual banker.¹⁹⁵ A bank may be said to be acting in contemplation of insolvency when, in making some disposition of its assets, it is actuated with a knowledge of its insolvency.¹⁹⁶

¹⁹³ Rev. St. U. S. § 5242 (U. S. Comp. St. 1901, p. 3517).

The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to Rev. St. U. S. §§ 5236, 5242 (U. S. Comp. St. 1901, pp. 3508, 3517), and is therefore inapplicable in the case of a national bank. *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1115-1117.

¹⁹⁴ See *Case v. Citizens' Bank of Louisiana*, Fed. Cas. No. 2,489, 2 Woods, 23; *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 28 C. C. A. 548. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1112.

¹⁹⁵ *Irons v. Manufacturers' Nat. Bank*, Fed. Cas. No. 7,068, 6 Biss. 301.

"An act of insolvency takes place when a business concern or a bank has failed to pay some of its obligations, made an assignment for benefit of creditors, suspended business, or done any of those things which indicate to creditors that a debtor has become insolvent." *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 28 C. C. A. 548. See "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 56, 160; *Cent. Dig.* § 249; "*Banks and Banking*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* § 1112.

¹⁹⁶ See *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 28 C. C. A. 548. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

The statute makes a transfer or a payment void when it is intended on the part of the bank to prefer one creditor to another, or to defeat the distribution of its assets in the manner prescribed by law, notwithstanding that the creditor receiving it does so without knowledge or suspicion of the insolvency of the bank.¹⁹⁷ But the law does not invalidate every transfer or payment by a bank after it is insolvent, or even after its managers become aware of its insolvency.¹⁹⁸ So long as a bank is a going concern, carrying on its business as usual, and has committed no act of insolvency, and a present suspension of business is not contemplated, though the bank is actually insolvent, payments or remittances in the usual course of business are not made in contemplation of insolvency or with a view to a preference.¹⁹⁹

While any disposition by a national bank, being insolvent or in contemplation of insolvency, of its assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden, liens, equities, and rights arising by express agreement, or implied from the nature of dealings between the parties, or by operation of law, prior to and not in contemplation of insolvency, are not invalidated.²⁰⁰ The prohibition is directed to the giving of a prefer-

¹⁹⁷ *National Security Bank v. Butler*, 129 U. S. 223, 9 Sup. Ct. 281, 32 L. Ed. 682; *Case v. Citizens' Bank of Louisiana*, Fed. Cas. No. 2,489, 2 Woods, 23. See, also, *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 28 C. C. A. 548. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

¹⁹⁸ See *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 28 C. C. A. 548. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

¹⁹⁹ *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 19 Sup. Ct. 787, 43 L. Ed. 1106, affirming *Hayden v. Chemical Nat. Bank*, 84 Fed. 874, 28 C. C. A. 548; *Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855. See, also, *Price v. Coleman* (C. C.) 22 Fed. 694; *Stone v. Jenison*, 111 Mich. 592, 70 N. W. 149, 36 L. R. A. 675. Cf. *Roberts v. Hill* (C. C.) 24 Fed. 571; ante, p. 347. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

²⁰⁰ *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed.

ence, not to the giving of security when a debt is created, and if the transaction is free from fraud in fact, and is intended merely to protect a loan made at the time, the creditor can retain the property transferred as security until the debt is paid, though the bank was insolvent and the creditor had reason to believe that to be a fact.²⁰¹ But if, as part of the same transaction, it is agreed that the security shall also stand as security for an antecedent debt, to that extent, at least, the transaction is void.²⁰² So, in an action by the receiver on a note, the maker may plead as an equitable set-off any debt due from the bank to him existing at the time of its failure, although the note did not mature until after the insolvency, and the allowance of such set-off is not a preference, since it is only the balance, if any, after the set-off is deducted, that can justly be held to form part of the assets of the insolvent.²⁰³ The set-off may

1059 (cf. *Yardley v. Philler*, 167 U. S. 344, 17 Sup. Ct. 835, 42 L. Ed. 192). See, also, *In re Armstrong* (C. C.) 41 Fed. 381.

The suspension of the bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee; but the assets pass to the receiver burdened with a lien in favor of the plaintiff in the attachment, which cannot be disregarded or displaced by the comptroller. *Earle v. Pennsylvania, Use of Commonwealth Title Ins. & Trust Co.*, 178 U. S. 449, 20 Sup. Ct. 915, 44 L. Ed. 1146.

When the bank is placed in the hands of a receiver, the federal law is the law of the distribution of its assets as against the state law, and determines whether a prior transaction gave rise to a right to a preference. *First Nat. Bank v. Selden*, 120 Fed. 212, 56 C. C. A. 532, 62 L. R. A. 559. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

²⁰¹ *Armstrong v. Chemical Nat. Bank* (C. C.) 41 Fed. 234, 6 L. R. A. 226. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

²⁰² *Stapylton v. Stockton*, 91 Fed. 327, 33 C. C. A. 542 (holding that if the creditor acts in good faith and in the belief that the bank is solvent, he may avail himself of the security to the extent of his present advances). See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

²⁰³ *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed.

be pleaded in an action at law.²⁰⁴ It is otherwise if the claim sought to be set off was acquired after an act of insolvency, for the rights of the parties become fixed at that time.²⁰⁵

ATTACHMENTS, INJUNCTIONS, AND EXECUTIONS

111. No attachment, injunction, or execution may be issued against a national bank or its property, before final judgment in any suit, action, or proceeding, in any state, county, or municipal court.

The provision against the issue of attachments, injunctions, and executions, already referred to, was not in the original bank act, but was added in 1873 as a proviso to another section, and was in the Revision placed where it now stands,²⁰⁶ thus indicating that it was intended as an aid to the enforcement of the principle of equality among creditors.²⁰⁷ Even before its enactment, it was held that the then provisions of the act manifested a design to secure the government against its payment of the bank's circulating notes and to secure the assets of the bank for ratable distribution among the general

1059; *Mercer v. Dyer*, 15 Mont. 317, 39 Pac. 314. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

²⁰⁴ *Yardley v. Clothier*, 51 Fed. 506, 2 C. C. A. 349, 17 L. R. A. 462; *Adams v. Spokane Drug Co.* (C. C.) 57 Fed. 888, 23 L. R. A. 334; *Armstrong v. Warner*, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

²⁰⁵ *Davis v. Knipp*, 92 Hun, 297, 36 N. Y. Supp. 705; *Venango Nat. Bank v. Taylor*, 56 Pa. 14; *Beckham v. Shackelford*, 8 Tex. Civ. App. 660, 29 S. W. 200. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 288; *Cent. Dig.* §§ 1105-1127.

²⁰⁶ Rev. St. U. S. § 5242 (U. S. Comp. St. 1901, p. 3517); ante, p. 421.

²⁰⁷ See *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 278-280½; *Cent. Dig.* §§ 1067-1074.

creditors, and that the property of a bank, attached at the suit of an individual creditor after the bank had become insolvent, could not be subjected to sale for the payment of his demand, against the claim for the property of a receiver subsequently appointed.²⁰⁸ By virtue of the amendment it stands as the paramount law of the land that attachments shall not issue from state courts against national banks, so that all the attachment laws of the states must be read as if they contained a proviso in express terms that they are not to apply to suits against a national bank.²⁰⁹ The prohibition does not in express terms refer to attachments in suits begun in the federal courts; but it has been held that by virtue of Rev. St. U. S. § 915 (U. S. Comp. St. 1901, p. 684), entitling the plaintiff in actions in the federal courts to similar remedies by attachment as those provided by the laws of the state, a federal court cannot issue a writ of attachment before final judgment against a national bank, its jurisdiction being limited by all the restrictions imposed upon the state courts.²¹⁰ A national bank, whether solvent or insolvent, is within the exemption from the issue of attachment before judgment which the act affords in suits in state courts; and jurisdiction over the person or property of a national bank is not acquired by the issue of an attachment out of a state court before judgment.²¹¹ A garnishment is

²⁰⁸ *First Nat. Bank v. Colby*, 21 Wall. 609, 22 L. Ed. 687. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 278-280½; *Cent. Dig.* §§ 1067-1074.

²⁰⁹ *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 278; *Cent. Dig.* §§ 1067-1069.

²¹⁰ *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 278; *Cent. Dig.* §§ 1067-1069.

²¹¹ *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 25 Sup. Ct. 775, 49 L. Ed. 1161.

No right to attachment against a national bank before judgment in a suit in a state court is given by Act July 12, 1882, c. 290, § 4, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), making the jurisdiction for suits by or against national banks the same as the jurisdiction

not an attachment within this provision; but a state court has no authority to order execution against a bank in the hands of a receiver, by reason thereof, although the rights thus acquired must be recognized by the comptroller.²¹²

The provision against the issue of injunctions, like that against attachments, is not limited to insolvent banks.²¹³ It is meant not merely to preserve to national banks control of their general assets, but applies to an order restraining the transfer or enforcement of notes as wrongfully pledged to a bank without notice.²¹⁴ It prevents the issue of any such writ in a state court.²¹⁵

for suits by or against banks not organized under any law of the United States. *Van Reed v. People's Nat. Bank*, supra. Cf. *Corn Exchange Bank of Chicago v. Blye*, 101 N. Y. 303, 4 N. E. 635. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 278; *Cent. Dig.* §§ 1067-1069.

²¹² *Earle v. Pennsylvania, Use of Commonwealth Title Ins. & Trust Co.*, 178 U. S. 449, 20 Sup. Ct. 915, 44 L. Ed. 1146. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 77; *Cent. Dig.* §§ 165-176½.

²¹³ *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567; *Freeman Mfg. Co. v. National Bank of the Republic*, 160 Mass. 398, 35 N. E. 865. Cf. *Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 575. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 279; *Cent. Dig.* § 1070.

²¹⁴ *Freeman Mfg. Co. v. National Bank of the Republic*, 160 Mass. 398, 35 N. E. 865.

Rev. St. U. S. § 5242 (U. S. Comp. St. 1901, p. 3517), was not repealed by Act July 12, 1882, c. 290, § 4, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), making the jurisdiction of suits against them the same as those against other banks which are or might be in the same place, nor by Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 (U. S. Comp. St. 1901, p. 514), declaring them, for the purpose of suit, citizens of their respective states, and federal jurisdiction so far the same for them as for individuals. *Freeman Mfg. Co. v. National Bank of the Republic*, supra. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 279; *Cent. Dig.* § 1070.

²¹⁵ *Meyer v. First Nat. Bank of Cœur d'Alene*, 10 Idaho, 175, 77 Pac. 334. See, also, *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 279; *Cent. Dig.* § 1070.

ACTIONS BY AND AGAINST NATIONAL BANKS

112. Suits, actions, and proceedings against a national bank may be had in any district court of the United States held within the district in which the bank may be established, or in any state, county, or municipal court in the county or city in which the bank is located having jurisdiction in similar cases. The federal district courts have original jurisdiction of all cases commenced by the United States, or by direction of any officer thereof, against any national bank, and of cases for winding up the affairs of any such bank, and of all suits brought by any such bank established in the district for which the bank is held, to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided by the National Bank Act. All national banks, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, are to be deemed citizens of the states in which they are respectively located.

In General

Among the powers conferred by the National Bank Act of June 3, 1864, upon national banks, is the power "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons."²¹⁶ The question as to the proper court in which the suit is to be brought, in respect to jurisdiction, is to be determined by other provisions.²¹⁷ These provisions have been changed, so far as concerns the jurisdiction

²¹⁶ Rev. St. U. S. § 5136 (U. S. Comp. St. 1901, p. 3455); Act June 3, 1864, c. 106, § 8, 13 Stat. 101.

²¹⁷ See *Manufacturers' Nat. Bank v. Baack*, Fed. Cas. No. 9,052, 8 Blatchf. 137. See "*Banks and Banking*," Dec. Dig. (Key No.) § 275; Cent. Dig. §§ 1056-1066.

of the federal courts, by the recent act, which abolishes the circuit courts, and gives original jurisdictions in matters formerly appertaining to them to the district courts and which prescribes the cases, by and against national banks, in which the district courts shall have jurisdiction. To the understanding of the present law it will be necessary to set out briefly the law as it stood before the recent enactment.

Jurisdiction Under Original Act

By the act of June 3, 1864, it was declared that suits, actions, and proceedings against any association "may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases: Provided, however, that all proceedings to enjoin the comptroller under this act shall be had in a circuit, district or territorial court of the United States held in the district in which such association is located."²¹⁸ The revision omitted the last provision, but this was remedied in 1875 by an amendment, which added the same provision, except the proviso, to Rev. St. § 5198.²¹⁹ The Revised Statutes provided, also, that the district courts should have jurisdiction "of all suits by or against any association * * * within the district for which the court is held,"²²⁰ and that the circuit courts should have original jurisdiction "of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations."²²¹ As the law thus stood,

²¹⁸ Act June 3, 1864, c. 106, § 57, 13 Stat. 116.

²¹⁹ Act Feb. 18, 1875, c. 80, 18 Stat. 320 (U. S. Comp. St. 1901, p. 3493). See *First Nat. Bank v. Morgan*, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. Ed. 282. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066.

²²⁰ Rev. St. U. S. § 563, subd. 15 (U. S. Comp. St. 1901, p. 459).

²²¹ Rev. Stat. U. S. § 629, subds. 10, 11 (U. S. Comp. St. 1901, p. 505).

the federal courts had jurisdiction over national banks, irrespective of the subject-matter²²² or the citizenship of the parties,²²³ and the state courts had concurrent jurisdiction.²²⁴

Later Provisions as to Citizenship

By act of July 12, 1882, it was provided that jurisdiction for suits brought by or against national banks, except suits between them and the United States, or its officers and agents, should be the same as the jurisdiction for suits by or against banks not organized under any law of the United States doing business in the same place.²²⁵ This act put national banks on the same footing as banks of the state where they were located for the purposes of jurisdiction of the federal courts, so that a national bank could not sue in a federal court merely by reason of the source of its incorporation.²²⁶ The foregoing provision was superseded by enactments in 1887 and 1888, by which it was provided that all national banking associations should, for the purposes of all actions against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they were respectively located, and that in such cases the circuit and district courts should

²²² *Foss v. First Nat. Bank* (C. C.) 3 Fed. 185. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066.

²²³ *Wilson County v. Third Nat. Bank*, 103 U. S. 770, 26 L. Ed. 488. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066; "*Courts*," *Dec. Dig. (Key No.)* §§ 294, 489; *Cent. Dig.* § 836.

²²⁴ *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *First Nat. Bank v. Morgan*, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. Ed. 282; *Brinckerhoff v. Bostwick*, 88 N. Y. 52. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066; "*Courts*," *Dec. Dig. (Key No.)* § 489; *Cent. Dig.* § 1336.

²²⁵ Act July 13, 1882, c. 290, § 4, 22 Stat. 163. See *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 10 Sup. Ct. 592, 33 L. Ed. 1002. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066.

²²⁶ *Leather Manufacturers' Nat. Bank v. Cooper*, 120 U. S. 778, 7 Sup. Ct. 777, 30 L. Ed. 816. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 775; *Cent. Dig.* §§ 1056-1066.

not have jurisdiction other than such as they would have in cases between individual citizens of the same state—these provisions not to affect the jurisdiction of the United States courts in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.²²⁷ “The necessary effect of this legislation was to make national banks, for the purpose of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts * * * simply upon the ground that they were created by, and exercised their powers under, acts of Congress. * * * Of course * * * there remained to a national bank, independently of its federal origin, and as a citizen of the state in which it was located, the right to invoke the federal jurisdiction of the circuit courts in any suit involving the required amount, and which by reason of its subject-matter, and not by reason simply of the federal origin of the bank, was a suit arising under the constitution and laws of the United States.”²²⁸

²²⁷ Act March 3, 1887, c. 373, § 4, 24 Stat. 554, and Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 (U. S. Comp. St. 1901, p. 514).

²²⁸ *Continental Nat. Bank v. Buford*, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119. See, also, *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 12 Sup. Ct. 325, 35 L. Ed. 1144; *Ex parte Jones*, 164 U. S. 691, 17 Sup. Ct. 222, 41 L. Ed. 601; *Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130; *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; *Walker v. Windsor Nat. Bank*, 56 Fed. 76, 5 C. C. A. 421; *Andrews v. Thum*, 64 Fed. 149, 12 C. C. A. 77. Review of decision of state courts involving federal question, see *Miller v. National Bank of Lancaster*, 106 U. S. 542, 1 Sup. Ct. 536, 27 L. Ed. 289; *Union Nat. Bank v. Louisville, N. A. & C. R. Co.*, 163 U. S. 325, 16 Sup. Ct. 1039, 41 L. Ed. 177; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; *Leyson v. Davis*, 170 U. S. 36, 18 Sup. Ct. 500, 42 L. Ed. 939; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 19 Sup. Ct. 202, 43 L. Ed. 502; *Seeberger v. McCormick*, 175 U. S. 274, 20 Sup. Ct. 128, 44 L. Ed. 161; *Talbot v. Sioux Nat. Bank*, 185 U. S. 182, 22 Sup.

Actions by and Against Receivers

A receiver is an officer of the government, and an action against him in his representative capacity is one arising under the laws of the United States, and jurisdiction of the circuit court therein was not dependent on diversity of citizenship of the parties.²²⁹ And so of an action against an "agent," substituted for the receiver in voluntary liquidation; the action being one to wind up the affairs of the bank.²³⁰ Similarly, an action may be maintained by a receiver²³¹ or agent.²³²

Ct. 621, 46 L. Ed. 862; *Rankin v. Barton*, 199 U. S. 228, 26 Sup. Ct. 29, 50 L. Ed. 163. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066; "*Courts*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 836.

²²⁹ *Auten v. United States Nat. Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; *McDonald v. State of Nebraska*, 101 Fed. 171, 41 C. C. A. 278.

A case arising under the laws of the United States was presented by a bill filed by the holder of a nonnegotiable note, given by a bank which afterwards went into voluntary liquidation, to enforce the stockholders' liability. *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 275, 287; *Cent. Dig.* §§ 1099-1105; "*Courts*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 836.

²³⁰ *Weeks v. International Trust Co.*, 125 Fed. 370, 60 C. C. A. 236; *International Trust Co. v. Weeks*, 203 U. S. 364, 27 Sup. Ct. 69, 51 L. Ed. 224. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066; "*Courts*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 836.

²³¹ *Short v. Hepburn*, 75 Fed. 113, 21 C. C. A. 252; *Lake Nat. Bank v. Wolfeborough Sav. Bank*, 78 Fed. 517, 24 C. C. A. 195; *Myers v. Hettinger*, 94 Fed. 370, 37 C. C. A. 369; *McCartney v. Earle*, 115 Fed. 462, 53 C. C. A. 392; *Murray v. Chambers* (C. C.) 151 Fed. 142.

Such jurisdiction is lost by a sale and transfer of the receiver's interest in the subject-matter. *Weaver v. Kelly*, 92 Fed. 417, 34 C. C. A. 423. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066, 1099-1105.

²³² *McConville v. Gilmour* (C. C.) 36 Fed. 277, 1 L. R. A. 498. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* §§ 1056-1066, 1099-1105.

Removal

The same considerations govern the right of removal from a state to a federal court. The bank cannot remove on the mere ground that it is a national bank, but must establish the right upon some other ground.²³³ An action against a receiver²³⁴ or "agent" is removable, but not an action in which the receiver is not a necessary party, as where he is admitted as a party in an action which was pending against the bank at the time of his appointment.²³⁵

Changes by Act of 1911

By an act to codify, revise, and amend the laws relating to the judiciary, which took effect January 1, 1912, important changes affecting the jurisdiction of the federal courts have been made. The act repeals the former provisions conferring jurisdiction upon the district courts and upon the circuit courts,²³⁶ as well as the provisions of the acts of 1887 and 1888 above referred to.²³⁷ It provides, among other things, that "the district courts shall have original jurisdiction as follows: * * * Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the af-

²³³ *Leather Manufacturers' Nat. Bank v. Cooper*, 120 U. S. 778, 7 Sup. Ct. 777, 30 L. Ed. 816; *Wichita Nat. Bank v. Smith*, 72 Fed. 568, 19 C. C. A. 42; *Speckert v. German Nat. Bank*, 98 Fed. 151, 38 C. C. A. 682. See, also, *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 12 Sup. Ct. 325, 35 L. Ed. 1144. See "*Removal of Causes*," *Dec. Dig. (Key No.)* §§ 19, 20, 30, 72, 82; *Cent. Dig.* §§ 37-47.

²³⁴ *Grant v. Spokane Nat. Bank (C. C.)* 47 Fed. 673; *Hot Springs Independent School Dist. No. 10 of Fall River County v. First Nat. Bank (C. C.)* 61 Fed. 417; *Guarantee Co. of North Dakota v. Hanway*, 104 Fed. 369, 44 C. C. A. 312. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 19, 20, 32; *Cent. Dig.* §§ 37-47, 85.

²³⁵ *Speckert v. German Nat. Bank*, 98 Fed. 151, 38 C. C. A. 682. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 19, 20, 32; *Cent. Dig.* §§ 37-47, 75.

²³⁶ Rev. St. U. S. §§ 563, 629 (U. S. Comp. St. 1901, pp. 455, 503). For repeal, see Act March 3, 1911, c. 231, § 297, 36 Stat. 1168.

²³⁷ *Ante*, p. 430.

fairs of any such bank, and of all suits brought by any banking association established in the district for which the court is held, under the provisions of the title 'National Banks,' Revised Statutes, to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided by said title. And all such associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located."²³⁸

It seems that the effect of this legislation, except for the abolition of the circuit courts and the transfer of all original federal jurisdiction to the district courts, is to leave unchanged the law in respect to the jurisdiction of the federal courts and the state courts, respectively, in national bank cases.

TAXATION BY STATES

113. The shares of stock in a national bank are subject to taxation by the state in which the bank is located, and the legislature may direct and determine the manner and place of taxing the shares, subject to the restrictions: (1) That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the states; and (2) that the shares owned by nonresidents shall be taxed in the city or town where the bank is located. The real property of the bank is subject to state, county, and municipal taxes, to the same extent, according to its value, as other real property.

In General

By the act of June 3, 1864, in lieu of all existing taxes, national banks were required to pay to the treasurer of the

²³⁸ Act March 3, 1911, c. 231, § 24 (16), 36 Stat. 1091.

United States a duty of certain percentages upon the average amounts of their notes in circulation, their deposits, and their capital stock.²³⁹ Another section of the act provides that "nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder * * * in assessing taxes imposed by authority of the state in which the association is located," and provides for the taxation of the shares and of the real property as set forth in the black letter text.²⁴⁰

Power of Congress and States

National banks being instruments designed to be used to aid the government in the administration of the public service, and appropriate means to that end, of which Congress is the sole judge, the state can exercise no control over them, by taxation or otherwise, except as Congress may see proper to permit,²⁴¹ and the provisions of the act concerning taxation are constitutional.²⁴² Such provision was necessary to authorize the states to impose any tax whatever on the bank shares, and as Congress was thus conferring a power on the states, which they would not otherwise have, to tax such shares, it imposed a restriction on the exercise of the power

²³⁹ Rev. St. U. S. § 5214 (U. S. Comp. St. 1901, p. 3500). This section has been amended by Act May 30, 1908, c. 229, § 9, 35 Stat. 550 (U. S. Comp. St. Supp. 1909, p. 1332). See, also, Rev. St. U. S. §§ 5215-5218 (U. S. Comp. St. 1901, pp. 3501, 3502); Act March 14, 1900, c. 41, § 13, 31 Stat. 49 (U. S. Comp. St. 1901, p. 3501); Act Dec. 21, 1905, c. 3, § 1, 34 Stat. 5 (U. S. Comp. St. Supp. 1909, p. 935).

²⁴⁰ Rev. St. U. S. § 5219 (U. S. Comp. St. 1901, p. 3502). See, also, Rev. St. U. S. § 5210 (U. S. Comp. St. 1901, p. 3498).

²⁴¹ *Farmers' & Mechanics' Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; *First Nat. Bank of Albuquerque v. Albright*, 208 U. S. 548, 28 Sup. Ct. 349, 52 L. Ed. 614. See "*Taxation*," *Dec. Dig. (Key No.)* § 10; *Cent. Dig.* §§ 23-26.

²⁴² *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *Bradley v. Illinois*, 4 Wall. 459, 18 L. Ed. 433. See "*Taxation*," *Dec. Dig. (Key No.)* § 10; *Cent. Dig.* §§ 23-26.

designed to prevent discriminatory taxation permitting the states to tax the shares as the personal property of the owner to the same extent as other moneyed capital invested in the state, and to tax the real estate as other real estate is taxed.²⁴³ The power so conferred extends to the territories.²⁴⁴ The power of the states to tax being thus confined to the shares and to the real estate, it follows that a tax imposed upon the franchise of a bank, not being levied upon the shares in the names of the shareholders, is invalid.²⁴⁵ And so of a tax upon all the intangible property of the bank.²⁴⁶ Its personal property cannot be taxed.²⁴⁷ The bank itself can be taxed only on its real estate.²⁴⁸ A tax cannot be imposed upon the president.²⁴⁹

Capital and Shares

The capital stock cannot be taxed as such by authority of the state; the only way it can be reached being by assessment

²⁴³ New York ex rel. Williams v. Weaver, 100 U. S. 539, 25 L. Ed. 705. See "Taxation," Dec. Dig. (Key No.) § 10; Cent. Dig. §§ 23-26.

²⁴⁴ Talbott v. Silver Bow County, 139 U. S. 438, 11 Sup. Ct. 594, 35 L. Ed. 210. See "Taxation," Dec. Dig. (Key No.) § 10; Cent. Dig. §§ 23-26.

²⁴⁵ Third Nat. Bank v. Stone, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035. See "Taxation," Dec. Dig. (Key No.) § 10; Cent. Dig. §§ 23-26.

²⁴⁶ Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850. See "Taxation," Dec. Dig. (Key No.) § 10; Cent. Dig. §§ 23-26.

²⁴⁷ Stapylton v. Thaggerd, 91 Fed. 93, 33 C. C. A. 353; City and County of San Francisco v. Crocker-Woolworth Nat. Bank (C. C.) 92 Fed. 273. Its personal assets and property in the hands of a receiver are exempt. Rosenblatt v. Johnston, 104 U. S. 462, 26 L. Ed. 832. See "Taxation," Dec. Dig. (Key No.) § 10; Cent. Dig. §§ 23-26.

²⁴⁸ Stapylton v. Thaggerd, 91 Fed. 93, 33 C. C. A. 353. See "Taxation," Dec. Dig. (Key No.) § 10; Cent. Dig. §§ 23-26.

²⁴⁹ Linton v. Childs, 105 Ga. 567, 32 S. E. 617. See "Taxation," Dec. Dig. (Key No.) § 10; Cent. Dig. §§ 23-26.

of the shares of the holders.²⁵⁰ Thus, where a state statute provided that national banks should be taxed, "but not at a greater rate than other moneyed capital in the hands of individuals in the state," and state banks were taxed on their capital, but not on their shares, it was held that, a tax on the capital not being equivalent to a tax on the shares of the holders, the statute was void.²⁵¹

The shares are subject to taxation in the hands of the individual shareholders.²⁵² But the act does not prescribe the manner in which the tax shall be collected, and a tax will not be deemed a tax on capital because the state law requires the bank, as agent of the shareholders, to pay the tax on the shares.²⁵³ The shares in the hands of the shareholders are subject to taxation, although some or all of the capital is invested in national securities declared to be exempt from taxation by state authority.²⁵⁴

²⁵⁰ Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229; New York ex rel. Duer v. Commissioners of Taxes and Assessments, 4 Wall. 244, 18 L. Ed. 344; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. Ed. 701. See "Taxation," Dec. Dig. (Key No.) § 11; Cent. Dig. §§ 27-29.

²⁵¹ Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229. See "Taxation," Dec. Dig. (Key No.) § 11; Cent. Dig. §§ 27-29.

²⁵² Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. Ed. 189; Van Slyke v. Wisconsin, 154 U. S. 581, 14 Sup. Ct. 1168, 20 L. Ed. 240.

Shares owned by another national bank are not exempt. National Bank of Redemption v. Boston, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689. See "Taxation," Dec. Dig. (Key No.) § 11; Cent. Dig. §§ 27-29.

²⁵³ First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. Ed. 701; First Nat. Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; Merchants' & Mfrs.' Nat. Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; Covington v. First Nat. Bank, 198 U. S. 100, 25 Sup. Ct. 562, 49 L. Ed. 963; Citizens' Nat. Bank v. Commonwealth of Kentucky, to Use of Boyle County, 217 U. S. 443, 30 Sup. Ct. 532, 54 L. Ed. 832. See "Taxation," Dec. Dig. (Key No.) § 11; Cent. Dig. §§ 27-29.

²⁵⁴ Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229; New York

The only restrictions imposed on the states in the taxation of the shares are: (1) That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens; and (2) that the shares owned by nonresidents shall be assessed in the city or town where the bank is located. Nonresidents, therefore, cannot be taxed elsewhere, as in the state where they reside.²⁵⁵ Residents may be taxed at the place where the bank is located, or where they reside.²⁵⁶

Discrimination Between Shares and Other Moneyed Capital

Not only must the taxation be of the shares of the holders, as distinct from the capital, property, and franchise of the corporation, but it must not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens. The taxation must not discriminate against national banks.²⁵⁷ This does not mean that the states, in taxing their own corporations, must conform to the system of taxing national banks upon the shares in the hands of their owners.²⁵⁸ But any different method of assessment or taxation,

ex rel. *Duer v. Commissioners of Taxes and Assessments*, 4 Wall. 244, 18 L. Ed. 344; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701; *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 22 Sup. Ct. 394, 46 L. Ed. 456; *Hager v. American Nat. Bank*, 159 Fed. 396, 86 C. C. A. 334. See, also, *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901. See "*Taxation*," *Dec. Dig. (Key No.)* § 11; *Cent. Dig.* §§ 27-29.

²⁵⁵ *De Baun v. Smith*, 55 N. J. Law, 110, 25 Atl. 277. See "*Taxation*," *Dec. Dig. (Key No.)* §§ 280-282; *Cent. Dig.* §§ 456-460.

²⁵⁶ *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189; *Austin v. Board of Aldermen of City of Boston*, 14 Allen (Mass.) 359. See, also, *Austin v. Boston*, 7 Wall. 694, 19 L. Ed. 224. Cf. *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181. See "*Taxation*," *Dec. Dig. (Key No.)* §§ 280-282; *Cent. Dig.* §§ 456-460.

²⁵⁷ *Covington v. First Nat. Bank*, 198 U. S. 100, 25 Sup. Ct. 562, 49 L. Ed. 963. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁵⁸ *Davenport Nat. Bank v. Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73, 31 L. Ed. 94; *Covington v. First Nat. Bank*, 198 U.

the usual and probable effect of which would be to discriminate in favor of state banks, or other moneyed capital, and against national banks, is void.²⁵⁹ And even where no discrimination seemingly arises on the face of the statute, if it appears that the system in its execution produces material discrimination against national banks, the statute must be held void.²⁶⁰ And although the statute provides for equality, the systematic and intentional valuation of other moneyed capital below its true value, while national bank shares are assessed at their full value, is a violation of the act.²⁶¹ The taxation of national bank shares, without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other moneyed capital, is a discrimination within the prohibition.²⁶²

Other Moneyed Capital

The purpose of the restriction that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individuals is to prevent discrimination against national banks, and "moneyed capital" is construed to mean

S. 100, 25 Sup. Ct. 562, 49 L. Ed. 963; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 25 Sup. Ct. 384, 49 L. Ed. 669. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁵⁹ *Boyer v. Boyer*, 113 U. S. 689, 5 Sup. Ct. 706, 28 L. Ed. 1089; *Davenport Nat. Bank v. Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73, 31 L. Ed. 94; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 25 Sup. Ct. 384, 49 L. Ed. 669. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁶⁰ *Davenport Nat. Bank v. Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73, 31 L. Ed. 94. See, also, *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁶¹ *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901. See, also, *New York ex rel. Williams v. Weaver*, 100 U. S. 539, 25 L. Ed. 705. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁶² *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053. See, also, *Albany County v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 8 Sup. Ct.

capital engaged in operations of banking, capital that is money, or being employed as a source of profit by its use as money.²⁶³ Conversely, moneyed capital "does not include capital which does not come into competition with the business of national banks."²⁶⁴ The restriction does not apply to capital invested in mining, manufacturing, or transportation.²⁶⁵ An exemption of the stocks and bonds of insurance, wharf, and gas companies, or other noncompeting capital or credits is not an unlawful discrimination against national banks, whose shares are taxed.²⁶⁶ Where trust companies are not banks in the commercial sense, and do not perform the functions of banks in carrying on the exchanges of commerce, a franchise tax based upon their income, at least when it does not appear that a less rate of taxation falls on this form of capital than that imposed on national bank shares, does not show discrimination.²⁶⁷ Although the deposits of savings banks are moneyed

1121, 32 L. Ed. 118. Cf. *First Nat. Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412, 40 L. Ed. 573; *First Nat. Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁶³ *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁶⁴ *First Nat. Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669. See, also, *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 21 Sup. Ct. 863, 45 L. Ed. 1227. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁶⁵ *Talbott v. Silver Bow County*, 139 U. S. 438, 11 Sup. Ct. 594, 35 L. Ed. 210. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁶⁶ *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

²⁶⁷ *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *National Bank of Redemption v. Boston*, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689; *Jenkins v. Neff*, 186 U. S. 230, 22 Sup. Ct. 905, 46 L. Ed. 1140. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

capital in the hands of individuals, they are not within the restriction in such sense as to require that, if they are exempted from taxation, shares of stock in national banks' shall also be exempted; it being the policy of the state to encourage such institutions, and the exemption not being an unfriendly discrimination against investments in national bank shares.²⁶⁸

²⁶⁸ *National Bank of Redemption v. Boston*, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *Davenport Nat. Bank v. Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73, 31 L. Ed. 94. See, also, *First Nat. Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669. See "*Taxation*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 30.

CHAPTER XIII

SAVINGS BANKS

- 114. Nature of Savings Banks.
- 115. Management and Officers.
- 116. Relation Between Bank and Depositor.
- 117. By-Laws—Contract of Deposit.
- 118. Payment on Production of Pass Book.
- 119. Gift of a Deposit—Deposit in Trust.
- 120. Deposit in Name of Another.
- 121. Delivery of Pass Book.
- 122. Joint Deposit.

NATURE OF SAVINGS BANK

114. A savings bank, in the stricter sense, is a corporation, without capital stock and stockholders, created for the purpose of receiving the moneys of small depositors and investing them, subject to the restrictions of the charter, solely for the benefit of the depositors, repaying to them the amount of their deposits, with interest, as payment may be called for from time to time. In some states, however, savings banks may be incorporated with a capital stock, in which the stockholders receive the profits over the interest reserved to the depositors.

In General

A savings bank, using the term in its stricter sense, is an incorporated agency for receiving the moneys of depositors in small or moderate amounts, and investing them merely for the use and benefit of the depositors, who are to receive the advantage thereof in just proportion.¹ The chief purpose is

¹ *Lewis v. Lynn Inst. for Savings*, 148 Mass. 235, 19 N. E. 365, 1 L. R. A. 785, 12 Am. St. Rep. 535. See, also, *Mitchell v. Beckman*,

to encourage frugality by affording to persons of small means an opportunity to have their savings cared for by persons of experience, who, by combining the deposits, can make advantageous investments not available for small investors.² Usually, therefore, the corporation has no capital stock, and no profit or benefit accrues to the managers, beyond their salaries.³

Sometimes, however, the original and strict type of savings banks is departed from, and savings banks are incorporated with a capital stock, in which the stockholders participate in the profits over the interest reserved to the depositors,⁴ and other incidents of corporations organized as commercial enterprises, such as the liability of the stockholders to creditors,

64 Cal. 117, 28 Pac. 110; *Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 378; *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, 54 Atl. 543; *People v. Binghamton Trust Co.*, 139 N. Y. 185, 34 N. E. 898.

Whether a bank is a savings bank depends, not on its designation, but on its functions. *State v. Lincoln Sav. Bank*, 82 Tenn. 42.

Under a constitutional provision that no act authorizing corporations or associations with banking powers shall take effect until submitted to the people, an act authorizing savings societies is included. *Reed v. People ex rel. Hunt*, 125 Ill. 592, 18 N. E. 295, 1 L. R. A. 324. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 1128, 1130.

² See *Huntington v. Nat. Sav. Bank*, 96 U. S. 388, 24 L. Ed. 777; *Lewis v. Lynn Inst. for Savings*, 148 Mass. 235, 19 N. E. 365, 1 L. R. A. 785, 12 Am. St. Rep. 535. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 1128, 1130.

³ *Lewis v. Lynn Inst. for Savings*, 148 Mass. 235, 19 N. E. 365, 1 L. R. A. 785, 12 Am. St. Rep. 535; *Dickson v. Kittson*, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447. See, also, *Sheren v. Mendenhall*, 23 Minn. 92. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 289, 294; *Cent. Dig.* §§ 1128, 1139.

⁴ See *Newton v. Eagle & Phenix Mfg. Co. (C. C.)* 101 Fed. 149; *Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317; *Ackenhausen v. People's Sav. Bank*, 110 Mich. 175, 68 N. W. 118, 33 L. R. A. 408, 64 Am. St. Rep. 338. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 289, 293; *Cent. Dig.* §§ 1128, 1133-1135.

may exist.⁵ Recently so-called postal savings banks have been created by act of Congress.⁶

Under the normal type of savings bank, the relation between the bank and its depositors is one of trust, defined by its charter and by-laws.⁷ The depositors are not, as such, stockholders or members of the corporation.⁸ The moneys deposited are not used in making ordinary loans and discounts, as in the case of commercial banks, and usually the law of incorporation carefully defines the securities in which the trustees may invest, such as real estate mortgages, bonds of the United States and of states and municipalities, railroad bonds, and the like, and also provides for and regulates the management of the bank to the end that the savings of the depositors may be safely invested and secured. A discussion of the questions presented under these statutory provisions will not be attempted. The principal questions to be considered are those that arise from the relation between the depositors and the bank.

Powers of Bank—Ultra Vires

As with other incorporated banks, the powers of a savings bank are, of course, to be determined by its charter or the act under which it is incorporated.⁹ Like other corporations created for business purposes, unless expressly restrained, savings banks have implied power to incur debts in the course of

⁵ See *Queenan v. Palmer*, 117 Ill. 62, 619, 7 N. E. 470, 613; *Herron v. Vance*, 17 Ind. 595; *Franklin Sav. Bank v. Fatzinger* (Pa.) 4 Atl. 912; *In re Gibbs*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 293; *Cent. Dig.* §§ 1133-1135.

⁶ Act June 25, 1910, c. 386, 36 Stat. 814.

⁷ See *Dickson v. Kittson*, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447; *Dodd v. Una*, 40 N. J. Eq. 672, 5 Atl. 155; *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, 54 Atl. 543, affirmed 66 N. J. Eq. 431, 57 Atl. 1131. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 293, 294; *Cent. Dig.* §§ 1133-1149.

⁸ *Savings Bank of New London v. Town of New London*, 20 Conn. 111. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 293; *Cent. Dig.* §§ 1133-1135.

⁹ Ante, p. 273.

their legitimate business, and to make negotiable paper in payment of such debts and to pledge their securities as a means of borrowing.¹⁰

Where a contract beyond the powers of the bank has been made, it cannot be enforced by either party, so long as it is executory.¹¹ Nor can it be enforced if it is against public policy or immoral.¹² But otherwise, if the contract has been executed, the defense of ultra vires, according to the prevailing rule, is not open to the bank,¹³ nor to the other party in an action by the bank.¹⁴ So statutes prohibiting certain transactions for the protection of the depositors are not available in defense in an action by the bank, where contracts have been entered into not in conformity therewith.¹⁵ A law making it

¹⁰ See *Sistare v. Root*, 88 N. Y. 527, affirming 24 Hun, 384; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318; *Hieronimus v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 295, 302; *Cent. Dig.* §§ 1150-1153, 1189-1191.

¹¹ *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 295; *Cent. Dig.* §§ 1150-1153.

¹² *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 295; *Cent. Dig.* §§ 1150-1153.

¹³ *Laidlaw v. Bank (Cal.)* 67 Pac. 897; *Cogswell v. Rockingham Ten Cents Sav. Bank*, 59 N. H. 53. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 295; *Cent. Dig.* §§ 1150-1153.

¹⁴ *United German Bank of Baltimore City v. Katz*, 57 Md. 128; *Hieronimus v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333; *Hurd v. Green*, 17 Hun (N. Y.) 327, affirmed 78 N. Y. 588, 34 Am. Rep. 567. See, also, *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 295; *Cent. Dig.* §§ 1150-1153.

¹⁵ *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; *Farmington Sav. Bank v. Fall*, 71 Me. 49; *Auburn Sav. Bank v. Brinkerhoff*, 44 Hun (N. Y.) 142.

Code Iowa, § 1855, prohibiting savings banks from contracting any debt except for deposits and expenses, etc., was, for the benefit of depositors, creditors, etc., and, when such a bank becomes insolvent, creditors, whose loans were prohibited thereby, should not be al-

unlawful for a bank to receive from any person a deposit in excess of a certain amount does not prevent a recovery of the excess.¹⁶

MANAGEMENT AND OFFICERS

115. Savings banks of the normal type are managed by a board of trustees, who are named in the charter, who fill vacancies in the board, and who appoint the executive officers.

Savings banks of the normal type are managed by a board of trustees, or directors, or managers, who are named in the charter or certificate of incorporation, who themselves fill vacancies in the board and who appoint the treasurer and other executive officers.¹⁷

The powers of the various officers must be sought in the charter and by-laws. The treasurer is an officer who has, by virtue of his office, much more limited powers than the cashier of a commercial bank, and his duties, it has been said, more nearly resemble those of the paying and receiving tellers of such banks.¹⁸ Greater authority may, of course, be conferred upon him by the board of trustees, expressly or impliedly.¹⁹

lowed to share with lawful creditors. *State v. Corning State Sav. Bank*, 136 Iowa, 79, 113 N. W. 500. See, also, *Laidlaw v. Pacific Bank*, 137 Cal. 392, 70 Pac. 277. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 295; *Cent. Dig.* §§ 1150-1153.

¹⁶ *Taylor v. Empire State Sav. Bank*, 66 Hun, 538, 21 N. Y. Supp. 643. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 305; *Cent. Dig.* § 1179.

¹⁷ See *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* §§ 1136-1149.

¹⁸ *Fifth Ward Sav. Bank v. First Nat. Bank*, 47 N. J. Law, 357, 7 Atl. 318. See, also, *Bradlee v. Warren Five Cents Sav. Bank*, 127

¹⁹ *North Brookfield Sav. Bank v. Flanders*, 161 Mass. 335, 37 N. E. 307. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 297; *Cent. Dig.* § 1155.

The trustees occupy a fiduciary relation to the depositors.²⁰ It is their duty to exercise in the discharge of their trust the same good faith and substantially the same degree of diligence and care that is demanded of the directors of other banks.²¹ They should exercise the care and diligence which a reasonably prudent business man would exercise in similar business of his own.²² For losses which result from their dishonesty, disregard of charter requirements or culpable negligence they are personally liable.²³ The liability of the other officers is similar.²⁴ In addition to their common-law liability, the trustees are often made liable for certain derelictions of duty by statute.²⁵ An action to enforce the liability of the officers may be brought by the bank or by its receiver.²⁶ And it may be brought by the depositors upon refusal of the bank to bring suit; the bank, or the receiver, if one has been appointed, be-

Mass. 107, 34 Am. Rep. 351; *Com. v. Reading Sav. Bank*, 133 Mass. 16, 43 Am. Rep. 495; *Holden v. Upton*, 134 Mass. 177; *Holden v. Phelps*, 135 Mass. 61; *Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606. Cf. *Bangor Sav. Bank v. Wallace*, 87 Me. 28, 32 Atl. 716. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 297; *Cent. Dig.* § 1155.

²⁰ See cases cited ante, note 7.

²¹ Ante, p. 296.

²² *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Id.*, 46 N. J. Eq. 25, 18 Atl. 824. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 294, 297; *Cent. Dig.* §§ 1141-1149, 1154-1156.

²³ *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962; *Williams v. McDonald*, 42 N. J. Eq. 392, 7 Atl. 866; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546. See, also, *Dunn's Adm'r v. Kyle's Ex'r*, 14 Bush (Ky.) 134. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* §§ 1141-1149.

²⁴ *Williams v. Riley*, 34 N. J. Eq. 398; *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* §§ 1141-1149.

²⁵ See *Ryan v. Ray*, 105 Ind. 101, 4 N. E. 214; *Van Dyck v. McQuade*, 86 N. Y. 38. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* §§ 1141-1149.

²⁶ *Dodd v. Wilkinson*, 41 N. J. Eq. 566, 7 Atl. 337. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 1149.

ing a necessary party.²⁷ In some cases the procedure is governed by statute.²⁸

RELATION BETWEEN BANK AND DEPOSITOR

116. The relation between the bank and the depositor is in effect that of debtor and creditor; but, while the depositor is entitled to be repaid in full if the assets are sufficient, in case of a deficiency all must share alike in the losses as well as in the profits. Upon insolvency the debts of the bank are to be first paid, and a depositor cannot set off the amount of his deposit against his debt to the bank.

In General

The relation between the bank and the depositor necessarily contemplates that the money of the depositors shall be mingled, and that out of the general fund the investments shall be made and the expenses of administration shall be paid. It follows that the bank has title to the moneys deposited as well as to the securities in which they are invested.²⁹ It is often said, therefore, that the relation between the bank and the depositor is that of debtor and creditor.³⁰ Nevertheless

²⁷ *Chester v. Hilliard*, 34 N. J. Eq. 341. See, also, *Winchester v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153; *Niccolls v. Rice*, 147 Cal. 633, 82 Pac. 321; *Maisch v. Saving Fund*, 5 Phila. (Pa.) 30; *Leffman v. Flanigan*, 5 Phila. (Pa.) 155. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 1149.

²⁸ *Ryan v. Ray*, 105 Ind. 101, 4 N. E. 214. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 1148.

²⁹ *Ward v. Johnson*, 5 Ill. App. 30; *Zinn v. Mendel*, 9 W. Va. 580. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 129-131, 301; *Cent. Dig.* §§ 312-338, 1162-1176.

³⁰ *Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Schippers v. Kempkes* (N. J.) 67 Atl. 1042. See, also, *Robinson v.*

it must be remembered that, while the bank may combine the deposits, it is a mere agency for investing the money of the depositors, and that, while a depositor is entitled to be repaid in full if the assets are sufficient, one depositor can have no greater rights than any other, and in case of a deficiency all must share alike in the losses as well as in the profits, and consequently there can be no promise to pay in full at all events.³¹ "The corporation is a mere agency for managing the moneys of the depositors. To others—to third persons—the corporation can incur liabilities, in contract or in tort, for which the funds in its hands will be responsible. But to the depositors themselves the undertaking of the corporation is that it will receive and combine the deposits, and manage and use them to the best practicable advantage, according to the judgment of the trustees, and give to the depositors in just proportion among themselves the benefit of the result of such management. There is no absolute promise to repay to any depositor the full amount of his deposit at all events. Such a promise to one depositor would imply that, in case of loss, he should be repaid out of the deposits of others. But the promise or undertaking of the corporation is the same to all. There is no promise to pay one at the expense of others. The promise is, in effect, to pay each depositor in full, with his dividends, provided the assets are sufficient, and, if they are not sufficient, then to pay to each one his proportionate share."³² It follows that if the bank had suffered losses, so

Aird, 43 Fla. 30, 29 South. 633. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 119, 289; *Cent. Dig.* §§ 289-292, 1128.

³¹ Lewis v. Lynn Inst. for Savings, 148 Mass. 235, 19 N. E. 365, 1 L. R. A. 785, 12 Am. St. Rep. 535. See, also, Bunnell v. Collinsville Savings Soc., 38 Conn. 203, 9 Am. Rep. 380; Abbott v. Wolfeborough Sav. Bank, 68 N. H. 290, 38 Atl. 1050; Mann v. Carter, 74 N. H. 345, 68 Atl. 130, 15 L. R. A. (N. S.) 150. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 133, 305; *Cent. Dig.* §§ 339-352, 1177-1182.

³² Lewis v. Lynn Inst. for Savings, 148 Mass. 235, 19 N. E. 365, 1 L. R. A. 785, 12 Am. St. Rep. 535. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 133, 305; *Cent. Dig.* §§ 339-352, 1177-1182.

that the funds were insufficient to pay in full, this would be a defense in a suit by a depositor against the bank.³³

Insolvency

In insolvency proceedings the expenses of the administration and the debts of the bank are to be first paid in full, and the assets remaining are to be divided among the general depositors.³⁴

Owing to the peculiar relation between the depositor and the bank, a depositor who is also a debtor to the bank cannot, on its insolvency, unless it is otherwise provided by statute,³⁵ set off the amount of his deposit against his indebtedness; his debt to the bank belonging in fact to all the depositors, so that the demands are not mutual.³⁶

BY-LAWS—CONTRACT OF DEPOSIT

117. The rights of the depositors in respect to payment are usually regulated by the by-laws, which are a part of the contract between the bank and the depositor.

³³ *Lewis v. Lynn Inst. for Savings*, 148 Mass. 235, 19 N. E. 365, 1 L. R. A. 785, 12 Am. St. Rep. 535. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 133, 305; *Cent. Dig.* §§ 339-352, 1177-1182.

³⁴ *Cogswell v. Rockingham Ten Cents Sav. Bank*, 59 N. H. 43; *Stockton v. Mechanics' & Laborers' Sav. Bank*, 32 N. J. Eq. 163. See, also, *Kennedy v. New Orleans Sav. Inst.*, 36 La. Ann. 1; *Lewis v. Lynn Inst. for Savings*, 148 Mass. 235, 19 N. E. 365, 1 L. R. A. 785, 12 Am. St. Rep. 535. But see *People v. Mechanics' & Traders' Sav. Inst.*, 92 N. Y. 7. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 80, 81, 135, 309; *Cent. Dig.* §§ 184-197, 375-379, 1201-1214.

³⁵ See *North Bridgewater Sav. Bank v. Soule*, 129 Mass. 528. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 80, 81, 135, 309; *Cent. Dig.* §§ 184-197, 375-379, 1201-1214.

³⁶ *Osborn v. Byrne*, 43 Conn. 155, 21 Am. Rep. 641; *Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 378; *Cogswell v. Rockingham Ten Cents Sav. Bank*, 59 N. H. 43. See, also, *Van Dyck v. McQuade*, 20 Hun (N. Y.) 262, affirmed 85 N. Y. 616. See "*Banks and Banking*," *Dec. Dig. (Key No.)* §§ 80, 135, 309; *Cent. Dig.* §§ 184-196, 375-379, 1201-1214.

The duties and rights of the bank and of the depositors in respect to making and receiving payment are usually regulated by the by-laws. The depositors are often required to subscribe to the rules and regulations, and they thereby become a part of the contract of deposit. They are also usually printed in the pass book, so that by accepting the book the depositor agrees to be bound thereby.³⁷ The contract is also binding upon the bank, which cannot alter its contract with a depositor by a change in the by-laws to which he has not assented. If the depositor has not notice of a change, deposits afterwards made by him must be taken to have been made under the original contract.³⁸

PAYMENT ON PRODUCTION OF PASS BOOK

118. The by-laws usually provide that payment shall be made to the depositor only upon production of his pass book. Generally a payment by the bank, in good faith and in the exercise of ordinary care, to one who produces the book as his own, is binding on the depositor.

³⁷ *Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194; *Cosgrove v. Provident Inst. for Savings*, 64 N. J. Law, 653, 46 Atl. 617; *Warhus v. Bowery Sav. Bank*, 5 Duer (N. Y.) 67, affirmed 21 N. Y. 543; *Burrill v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669; *Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 21 Atl. 340, 11 L. R. A. 794, 25 Am. St. Rep. 744.

Otherwise where the depositor could not read English and the rule was not called to his attention. *Siegel v. State Bank* (App. Div.) 123 N. Y. Supp. 220. But see *Burrell v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669 (holding it immaterial that the depositor could not read). See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 300; *Cent. Dig.* §§ 1159-1161.

³⁸ *Kimins v. Boston Five Cent Sav. Bank*, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441; *Hudson v. Roxbury Inst. for Savings*, 176 Mass. 522, 57 N. E. 1021. See "*Banks and Banking*," *Dec. Dig.* (Key No.) § 300; *Cent. Dig.* §§ 1159-1161.

The by-laws usually provide in effect that payments shall be made only upon production of the depositor's pass book, in which all deposits and withdrawals are entered, and that presentment of the pass book shall be sufficient authority to the bank to make any payment to the bearer. Payments, when the depositor cannot present his book in person, are generally to be made upon the written order of the depositor, accompanied by the pass book. In case of loss of the book, payments are usually to be made upon satisfactory proof of loss and indemnity.³⁹

The by-laws of different banks, of course, differ, and the mutual rights and duties of the depositor and the bank in respect to payments will depend upon the particular by-laws in force. A few examples of the construction placed by the courts upon such by-laws will be given for the sake of illustration.

Where the by-law provides that all payments to persons producing the pass book shall be deemed valid, a payment to one who has stolen the book and who falsely impersonates the depositor will be binding on the depositor.⁴⁰ But the rules prescribed by the bank for its protection in the payment of deposits do not dispense with the exercise of ordinary care upon its part, and payment to a person producing the book,

³⁹ See *Wall v. Provident Inst. for Savings*, 3 Allen (Mass.) 96; *Id.*, 6 Allen (Mass.) 320; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194. Cf. *Palmer v. Providence Inst. for Sav.*, 14 R. I. 68, 51 Am. Rep. 341. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* §§ 1162-1176.

⁴⁰ *Goldrick v. Bristol County Sav. Bank*, 123 Mass. 320; *Donlan v. Provident Inst. for Savings*, 127 Mass. 183, 34 Am. Rep. 358; *Sullivan v. Lewiston Inst. for Savings*, 56 Me. 507, 96 Am. Dec. 500; *Cosgrove v. Provident Inst. for Savings*, 64 N. J. Law, 653, 46 Atl. 618. Cf. *Ackenhausen v. People's Sav. Bank*, 110 Mich. 175, 68 N. W. 118, 33 L. R. A. 408, 64 Am. St. Rep. 338. But see *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* §§ 1162-1176.

which he has stolen, will not discharge the bank if it has been negligent.⁴¹ And under a by-law providing that, as the bank may not be able to identify every depositor, it will not be responsible for loss where the depositor has not given notice that his book has been lost or stolen, if the deposit shall have been paid in whole or in part on presentation of the book, it has been held that, while payment to one fraudulently impersonating the depositor in presenting the book is authorized, the by-law is no protection to the bank if it pays to one presenting the book with a forged order purporting to be made by the depositor, and that in such case the bank is bound at its peril to ascertain the genuineness of the authority presented.⁴² If, to protect the bank against such forgeries, a by-law provides that the bank shall not be responsible to the depositor for frauds practiced upon it, it still owes to the depositor the duty to exercise ordinary care.⁴³

⁴¹ Ladd v. Androscoggin Sav. Bank, 96 Me. 510, 52 Atl. 1016; Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700; Appleby v. Erie County Sav. Bank, 62 N. Y. 12; Kummel v. Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786; Gearns v. Bowery Sav. Bank, 135 N. Y. 557, 32 N. E. 249; Gifford v. Rutland Sav. Bank, 63 Vt. 108, 21 Atl. 340, 11 L. R. A. 794, 25 Am. St. Rep. 744; Wegner v. Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096. See "*Banks and Banking*," Dec. Dig. (Key No.) § 301; Cent. Dig. §§ 1162-1176.

⁴² Ladd v. Androscoggin Sav. Bank, 96 Me. 520, 52 Atl. 1016; Jochumson v. Suffolk Sav. Bank, 3 Allen (Mass.) 87; Kimins v. Boston Five Cents Sav. Bank, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441; Kingsley v. Whitman Sav. Bank, 182 Mass. 252, 65 N. E. 161, 94 Am. St. Rep. 650. See, also, Hough Ave. Savings & Banking Co. v. Andersson, 78 Ohio St. 341, 85 N. E. 498, 18 L. R. A. (N. S.) 431, 125 Am. St. Rep. 707. Cf. Campbell v. Schenectady Sav. Bank, 114 App. Div. 337, 99 N. Y. Supp. 927; Winter v. Williamsburgh Sav. Bank, 68 App. Div. 193, 74 N. Y. Supp. 140. But see Langdale v. Citizens' Bank of Savannah, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 104 Am. St. Rep. 94. See "*Banks and Banking*," Dec. Dig. (Key No.) § 301; Cent. Dig. §§ 1162-1176.

⁴³ Chase v. Waterbury Sav. Bank, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329; Kummel v. Germania Sav. Bank, 127 N. Y. 488, 28 N. E.

The by-laws usually provide that on the death of the depositor the deposit shall be paid to his legal representatives.⁴⁴ Under such a rule it has been held that the bank is bound to see that payment is made to the duly appointed legal representative, and that payment to any other person, the bank having knowledge of the depositor's death, is at the peril of the bank; the by-law being made for the protection of the depositor when he can no longer protect himself.⁴⁵ But it has been held that, if the death be unknown to the bank, it is liable only if it fails to use ordinary care, where the by-laws also provide that payments to persons producing the books shall be valid.⁴⁶

GIFT OF A DEPOSIT

119. DEPOSIT IN TRUST—Where one person makes a deposit of his own money "as trustee" for another, a trust is thereby created if the depositor so intends; but some courts hold that communication to and acceptance by the beneficiary is essential, while other courts hold that such a deposit creates

398, 13 L. R. A. 786. See, also, *Levy v. Franklin Sav. Bank*, 117 Mass. 448.

Where a savings bank failed to make a physical comparison of a purported signature to a draft with the signature of the depositor on file in the bank, and the signature was a forgery, the bank is liable for such payment, for failure to exercise due care and ordinary caution. *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 72 N. E. 995, 69 L. R. A. 317, 105 Am. St. Rep. 720. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* §§ 1162-1176.

⁴⁴ See *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* §§ 1162-1176.

⁴⁵ *Mahon v. South Brooklyn Sav. Inst.*, 175 N. Y. 69, 67 N. E. 118, 96 Am. St. Rep. 603. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* §§ 1162-1176.

⁴⁶ *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 72 N. E. 995, 69 L. R. A. 317, 105 Am. St. Rep. 720. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* §§ 1162-1176.

a tentative trust, revocable at will until the depositor dies or completes the gift by some unequivocal act, such as delivery of the book or notice to the beneficiary.

120. DEPOSIT IN NAME OF ANOTHER—Where one person, with the intention of making a gift, deposits his own money in the name of another, who assents, the transaction operates as a gift of the deposit.

121. DELIVERY OF PASS BOOK—When a depositor, with the intention of making a gift, delivers his pass book to another, who assents, the transaction vests in him the equitable title to the deposit.

122. JOINT DEPOSIT—Where one person, with the intention of creating a joint ownership, deposits his own money as a joint deposit in the name of himself and another, the transaction operates accordingly as a gift; but some courts hold that delivery of the pass book to the other is essential.

Deposit in Trust

A trust in personal property may be created by the simple declaration of the owner that he holds the property in trust, with or without power of revocation. Thus, a trust of a deposit may be created when one person makes a deposit of his own money in a savings bank "as trustee" for another person. An intention to create a trust is requisite,⁴⁷ and such an intention is not necessarily to be inferred, because of the common practice of persons who have deposits in their own name in the full amount allowed to one person to open ac-

⁴⁷ *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* § 1170; "*Trusts*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 44.

counts in this form for their own benefit.⁴⁸ And the courts generally agree that to establish a trust something more is necessary than the mere opening of an account in the name of the depositor in trust for another.⁴⁹ Some cases go so far as to hold that such a deposit, not communicated to and accepted by the beneficiary, is insufficient to perfect a trust.⁵⁰ If there is an express declaration of trust, accepted by the beneficiary, it is not defeated by the fact that the trustee retains the book and thereby retains control.⁵¹ In New York

⁴⁸ See *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222; *Parkman v. Suffolk Sav. Bank for Seamen*, 151 Mass. 218, 24 N. E. 43. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* § 1170; "*Trusts*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 44.

⁴⁹ *Parkman v. Suffolk Sav. Bank for Seamen*, 151 Mass. 218, 24 N. E. 43; *Nicklas v. Parker*, 69 N. J. Eq. 743, 61 Atl. 267. See "*Trusts*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 44.

⁵⁰ *Clark v. Clark*, 108 Mass. 522; *Sherman v. New Bedford Five Cents Sav. Bank*, 138 Mass. 581; *Alger v. North End Sav. Bank*, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331; *Supple v. Suffolk Sav. Bank for Seamen*, 198 Mass. 393, 84 N. E. 432, 126 Am. St. Rep. 451.

A deceased person deposited money, in his own name, as trustee of certain persons individually, telling them that he had done so. The bank books were in the hands of one of them, but he held the books merely as the servant or agent of the deceased, and the latter retained the entire dominion and control of the funds, both principal and interest, during his life, and he did not intend that the title to or interest in the funds should pass from him until after his death. Held, that the transaction, being in the nature of a testamentary disposition, was an attempted evasion of the statute of wills, and that the funds so deposited remained the property of the depositor at the time of his death, and belonged to the administrator, to be divided according to the statute of distribution. *Nutt v. Morse*, 142 Mass. 1, 6 N. E. 763. See "*Banks and Banking*," *Dec. Dig. (Key No.)* § 301; *Cent. Dig.* § 1170; "*Trusts*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 44.

⁵¹ *Miller v. Clark (C. C.)* 40 Fed. 15. See, also, *Appeal of Buckingham*, 60 Conn. 143, 22 Atl. 509; *Scott v. Berkshire Co. Sav. Bank*, 140 Mass. 157, 2 N. E. 925. See "*Trusts*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 44.

it was formerly held that where one person makes a deposit as trustee for another it was to be presumed, in the absence of evidence to the contrary, that a trust was intended;⁵² but this doctrine has been limited, and it is now held that such a deposit, standing alone, does not establish an irrevocable trust during the lifetime of the depositor, but a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the book or notice to the beneficiary, but that if the depositor dies before the beneficiary, without revocation or disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the depositor's death.⁵³ The New York doctrine of a tentative trust, in such cases—that is, a trust originally revocable and only perfected by the death of the beneficiary—while its justice has been approved, has been adversely criticised as inconsistent with the law of trusts.⁵⁴

Deposit in Name of Another

Similarly, it is held that a deposit in the name of another is not alone sufficient to prove a gift.⁵⁵ The gift may be per-

⁵² See *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Willis v. Smyth*, 91 N. Y. 297. See "*Trusts*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 44.

⁵³ *In re Totter*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711 (reviewing prior cases). See, also, *Lattan v. Van Ness*, 107 App. Div. 393, 95 N. Y. Supp. 97. See "*Trusts*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 44.

⁵⁴ *Nicklas v. Parker*, 69 N. J. Eq. 743, 61 Atl. 267. See 19 Harv. Law Rev. 207. See "*Trusts*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 44.

⁵⁵ *Booth v. Bristol County Sav. Bank*, 161 Mass. 455, 38 N. E. 1120; *Marcy v. Amazeen*, 61 N. H. 131, 60 Am. Rep. 320; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; *Id.*, 137 N. Y. 59, 32 N. E. 998. See, also, *Robinson v. Ring*, 72 Me. 140, 39 Am. Rep. 308; *Northrop v. Hale*, 73 Me. 66; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

fected by communication to and assent of the donee,⁵⁶ even though the depositor retains the pass book,⁵⁷ but not if it appears that an absolute gift was not intended.⁵⁸

Delivery of Pass Book by Way of Gift

Delivery to a donee of the pass book, containing entries of deposits to the credit of the depositor, with the intention to give to the donee the deposits, if he assents, vests in the donee the equitable title to the deposits.⁵⁹ Evidence of an intention to give is requisite.⁶⁰ The gift, if made in this way, must be completed by delivery from the donor to the donee or to

⁵⁶ Wickford Sav. Bank v. Corey, 25 R. I. 217, 55 Atl. 684. See, also, Wilson v. Edwards, 79 Ark. 69, 94 S. W. 927; Eversole v. First Nat. Bank of London (Ky.) 51 S. W. 169. Cf. Goelz v. People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232.

Where a deposit is made without the knowledge of the alleged donee, and the deposit book is retained by the donor, if the evidence shows that the donor intended that the deposit should belong to the donee, and received and held the book for him until acceptance by him, it shows a completed gift, even though it might have been revoked before acceptance. Scott v. Berkshire Co. Sav. Bank. 140 Mass. 157, 2 N. E. 925. See "*Gifts*," Dec. Dig. (Key No.) §§ 30, 66; Cent. Dig. §§ 52-57, 65, 135-138.

⁵⁷ Smith v. Ossipee Val. Ten Cents Sav. Bank, 64 N. H. 228, 9 Atl. 792, 10 Am. St. Rep. 400. See "*Gifts*," Dec. Dig. (Key No.) §§ 30, 66; Cent. Dig. §§ 52-57, 65, 135-138.

⁵⁸ Hollowell Sav. Inst. v. Titcomb, 96 Me. 62, 51 Atl. 249. See "*Gifts*," Dec. Dig. (Key No.) §§ 30, 66; Cent. Dig. §§ 52-57, 65, 135-138.

⁵⁹ Meriden Sav. Bank v. McCormack, 79 Conn. 260, 64 Atl. 338; Hill v. Stevenson, 63 Me. 364, 18 Am. Rep. 231; Kimball v. Leland. 110 Mass. 325; Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680; Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758; Polley v. Hicks, 58 Ohio St. 218, 50 N. E. 809, 41 L. R. A. 858; Watson v. Watson, 69 Vt. 243, 39 Atl. 201. Otherwise of an ordinary bank book. Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. See "*Gifts*," Dec. Dig. (Key No.) §§ 30, 66; Cent. Dig. §§ 52-57, 65, 135-138.

⁶⁰ Nogga v. Savings Bank of Ansonia, 79 Conn. 425, 65 Atl. 129; See Jones v. Crisp, 109 Md. 30, 71 Atl. 515. See "*Gifts*," Dec. Dig. (Key No.) §§ 30, 66; Cent. Dig. §§ 52-57, 65, 135-138.

some one for the donee.⁶¹ Delivery of the book with an order for a sum less than the deposit, with intent to make a gift, is sufficient to vest title in the donee of the amount of the order.⁶² It is possible, however, to make a valid gift of a deposit in the donor's name otherwise than by delivery of the book, as by an assignment assented to by the donee and the bank.⁶³

Joint Deposit

Where two persons own jointly a deposit, the survivor becomes vested with the ownership of the entire fund. When one person makes a deposit in a savings bank in the joint names of himself and another, if the depositor's donative purpose is established, it is usually held to create a joint ownership, and to be a valid gift inter vivos.⁶⁴ This result does not follow, however, from the mere fact that a deposit is made in such form; for the depositor may always show that the money was his own and that such was not his intention. And as deposits are frequently made in this form when there is

⁶¹ *Dougherty v. Moore*, 71 Md. 248, 18 Atl. 35, 17 Am. St. Rep. 524; *In re Bolin*, 136 N. Y. 177, 32 N. E. 626.

Delivery to an agent, who is not to deliver till the donee's death, is not sufficient. *Augusta Sav. Bank v. Fogg*, 82 Me. 538, 20 Atl. 92.

If the book is in the hands of the donee, actual delivery is unnecessary. *Providence Inst. for Savings v. Taft*, 14 R. I. 502; *Goodrich's Ex'r v. Rutland Sav. Bank*, 81 Vt. 147, 69 Atl. 651, 17 L. R. A. (N. S.) 181. Cf. *Schollmier v. Schoendelen*, 78 Iowa, 426, 43 N. W. 282, 16 Am. St. Rep. 455. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

⁶² *Wetherow v. Lord*, 41 App. Div. 413, 58 N. Y. Supp. 778. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

⁶³ *Candee v. Connecticut Sav. Bank*, 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

⁶⁴ *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208; *Kelly v. Beers*, 194 N. Y. 49, 86 N. E. 980; *Id.*, 194 N. Y. 60, 86 N. E. 985; *Whitehead v. Smith*, 19 R. I. 135, 32 Atl. 168. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

no intention to create a joint ownership and no donative purpose, the mere form of the deposit is not enough to establish such intention.⁶⁵

Where the depositor delivers the pass book to the other with the purpose of making a gift, it is generally conceded that a joint tenancy is created.⁶⁶ Some courts refuse to hold such deposits valid as gifts, when the depositor retains the pass book;⁶⁷ but by the better rule, if the intent to create a joint tenancy appears, whether the book be delivered or not is of no consequence.⁶⁸ This has been explained on the ground that the transaction creates a contractual relation between the bank and the donee, and while by retention of the pass book the donor still has the power to withdraw the

⁶⁵ *Bath Savings Institution v. Fogg*, 101 Me. 188, 63 Atl. 731; *Taylor v. Coriell*, 66 N. J. Eq. 262, 57 Atl. 810; *In re Bolin*, 136 N. Y. 177, 32 N. E. 626; *Kelly v. Beers*, 194 N. Y. 49, 86 N. E. 980. Cf. *Augsbury v. Shurtliff*, 180 N. Y. 138, 72 N. E. 927; *Hallenbeck v. Hallenbeck*, 103 App. Div. 107, 93 N. Y. Supp. 73. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

⁶⁶ *Industrial Trust Co. v. Scanlon*, 26 R. I. 228, 58 Atl. 786. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

⁶⁷ *Dougherty v. Moore*, 71 Md. 248, 18 Atl. 35, 17 Am. St. Rep. 524; *Gorman v. Gorman*, 87 Md. 338, 39 Atl. 1038; *Whalen v. Milholand*, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208; *Flanagan v. Nash*, 185 Pa. 41, 39 Atl. 818.

Where plaintiff's testatrix deposited moneys, and the deposit book was headed with the names of testatrix and an intervening claimant, "payable to either or survivor," but it did not appear that the claimant ever had possession of the book, or knew of the deposit until after the death of testatrix, she was not entitled to recover the same. *Noyes v. Institution for Savings in Newburyport*, 164 Mass. 583, 42 N. E. 103, 49 Am. St. Rep. 484. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

⁶⁸ *McElroy v. National Sav. Bank*, 8 App. Div. 192, 40 N. Y. Supp. 340; *Farrelly v. Emigrant Industrial Sav. Bank*, 93 App. Div. 613, 87 N. Y. Supp. 541, affirmed 179 N. Y. 594, 72 N. E. 1141. See, also, *Appeal of Main*, 73 Conn. 638, 48 Atl. 965. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

deposit, thereby making the gift of no value, the legal effect of the transaction as a gift becomes complete upon the consummation of the contract which the bank enters into with both jointly, and which, having the incident of survivorship, vests the right of action thereon in the survivor.⁶⁹

Where there is no intention to make a gift *inter vivos*, but only an intention that the donee shall have what is left after the donor has exercised his absolute control during his life, the gift is void as not in compliance with the statute of wills.⁷⁰

⁶⁹ *Dunn v. Houghton* (N. J.) 51 Atl. 71 (but see *Taylor v. Coriell*, 66 N. J. Eq. 262, 57 Atl. 810). See, also, *Schippers v. Kempker* (N. J.) 67 Atl. 1042; *Industrial Trust Co. v. Scanlon*, 26 R. I. 228; 58 Atl. 786. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

⁷⁰ *Appeal of Main*, 73 Conn. 638, 48 Atl. 965; *Taylor v. Coriell*, 66 N. J. Eq. 262, 57 Atl. 810; *Providence Inst. for Savings v. Carpenter*, 18 R. I. 287, 27 Atl. 337. See, also, *Burns v. Burns*, 132 Mich. 441, 92 N. W. 1077. See "*Gifts*," *Dec. Dig. (Key No.)* §§ 30, 66; *Cent. Dig.* §§ 52-57, 65, 135-138.

APPENDIX

NATIONAL BANK ACT AND OTHER STATUTES OF THE UNITED STATES RELATING TO NATIONAL BANKS

INCORPORATING UNDER THE HEADINGS OF THE REVISED
STATUTES THE SUBSEQUENT LAWS, TOGETHER
WITH EXPLANATORY AND HISTORICAL NOTES

[The sections of the Revised Statutes are printed consecutively according to their numbering, and the section numbers, unless otherwise indicated, are those of the Revised Statutes. The explanatory and historical notes are taken, with necessary changes, from the Compiled Statutes of the United States 1901 and Compiled Statutes of the United States Supplement 1911, compiled by Mr. John A. Mallory, assisted by members of the editorial staff of the publishers, the West Publishing Co.]

THE COMPTROLLER OF THE CURRENCY

Sec.	Sec.
324. Bureau of the Comptroller of the Currency.	329. Interest in national banks.
325. Comptroller of the Currency.	330. Seal of Comptroller of the Currency.
326. Bond and oath of office of Comptroller of the Currency.	331. Rooms, vaults, furniture, etc., for Currency Bureau.
327. Deputy Comptroller of the Currency.	332. Banks in District of Columbia.
Act March 4, 1909, c. 297, § 1.	333. Report of Comptroller.
Assistant Deputy Comptroller of the Currency.	Act April 28, 1902, c. 594, § 1.
328. Clerks.	Report of expenses of liquidation of national banks.

Sec. 324. Bureau of the Comptroller of the Currency.—There shall be in the Department of the Treasury a Bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency

secured by United States bonds; the chief officer of which Bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99.

Sec. 325. Comptroller of the Currency.—The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate; and he shall be entitled to a salary of five thousand dollars a year.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99. Act March 3, 1875, c. 130, § 2, 18 Stat. 398.

Sec. 326. Bond and oath of office of Comptroller of the Currency.—The Comptroller of the Currency shall, within fifteen days from the time of notice of his appointment, take and subscribe the oath of office; and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99.

Sec. 327. Deputy Comptroller of the Currency.—There shall be in the Bureau of the Comptroller of the Currency a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand five hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the Constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99.

A Deputy Comptroller, \$3,000, was authorized by Act March 3, 1875, c. 130, § 2 (Comp. St. 1901, p. 124). Subsequent appropriations have varied from this amount.

An appropriation for Deputy Comptroller, \$3,500, and also for Deputy Comptroller, \$3,000, to be appointed by the Secretary of the Treasury, was made by a provision of Act March 4, 1909, c. 297, § 1, set forth below.

ACT MARCH 4, 1909, c. 297, § 1. [H. R. 23464.]

Assistant Deputy Comptroller of the Currency.—Office of the Comptroller of the Currency: For Comptroller of the Currency, five thousand dollars; Deputy Comptroller, three thousand five hundred dollars; Deputy Comptroller, three thousand dollars, who shall be appointed by the Secretary of the Treasury, and shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office of Comptroller and Deputy Comptroller or during the absence or inability of the Comptroller and the Deputy Comptroller, and said Assistant Deputy Comptroller shall give a like bond in the penalty of fifty thousand dollars; * *

Act March 4, 1909, c. 297, § 1, 35 Stat. 867.

This is a provision of the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1910, cited above.

Sec. 328. Clerks.—The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the Comptroller shall direct.

Act June 3, 1864, c. 106, § 1, 13 Stat. 100.

Provisions as to the employment of clerks by the heads of Departments are contained in Rev. St. § 169, and Act Aug. 5, 1882, c. 389, § 4, under that section (Comp. St. 1901, p. 85).

Clerks in the office of the Comptroller of the Currency are provided for in the annual appropriation acts.

A list of all officers, agents, clerks, and other employes of the office of the Comptroller of the Currency, and persons connected with the work of the office, is required to be furnished for the Official Register, by a provision of Act April 28, 1902, c. 594, § 1 (Comp. St. Supp. 1911, p. 1083).

Sec. 329. Interest in national banks.—It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99.

Sec. 330. [As amended 1875.] Seal of Comptroller of the Currency.—The seal devised by the Comptroller of the Currency for his office, and approved by the Secretary of the Treasury, shall continue to be the seal of office of the Comptroller, and may be renewed when necessary. A description of the seal, with an impression thereof, and a cer-

tificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State.

Act June 3, 1864, c. 106, § 2, 13 Stat. 100. Act Feb. 18, 1875, c. 80, 18 Stat. 317.

The amendment of this section by Act Feb. 18, 1875, c. 80, cited above, consists in the addition of the last sentence, providing for the filing of a description of the seal, etc., in the office of the Secretary of State.

Sec. 331. Rooms, vaults, furniture, etc., for Currency Bureau.—There shall be assigned, from time to time, to the Comptroller of the Currency, by the Secretary of the Treasury, suitable rooms in the Treasury building for conducting the business of the Currency Bureau, containing safe and secure fire-proof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily in the possession of engravers or printers, and other valuable things belonging to his Department; and the Comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the business of his office.

Act June 3, 1864, c. 106, § 3, 13 Stat. 100.

Sec. 332. Banks in District of Columbia.—The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of national banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations.

Act Jan. 20, 1873, c. 43, 17 Stat. 412.

Sec. 333. [As amended 1875.] Report of Comptroller.—The Comptroller of the Currency shall make an annual report to Congress, at the commencement of its session, exhibiting—

First. A summary of the state and condition of every association from which reports have been received the preceding year, at the several dates to which such reports refer, with an abstract of the whole amount of banking capital returned by them, of the whole amount of their

debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to such associations as, in his judgment, may be useful.

Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

Third. Any amendment to the laws relative to banking by which the system may be improved, and the security of the holders of its notes and other creditors may be increased.

Fourth. A statement exhibiting under appropriate heads the resources and liabilities and condition of the banks, banking companies, and savings-banks organized under the laws of the several States and Territories; such information to be obtained by the Comptroller from the reports made by such banks, banking companies, and savings-banks to the legislatures or officers of the different States and Territories, and, where such reports cannot be obtained, the deficiency to be supplied from such other authentic sources as may be available.

Fifth. The names and compensation of the clerks employed by him, and the whole amount of the expenses of the banking department during the year.

Act June 3, 1864, c. 106, § 61, 13 Stat. 117. Act Feb. 19, 1873, c. 166, § 1, 17 Stat. 466. Act Feb. 18, 1875, c. 80, 18 Stat. 317.

The amendment of this section by Act Feb. 18, 1875, c. 80, cited above, consists in the insertion, after the word "Congress," near the beginning of the section, of the words, "at the commencement of its session."

Provisions applicable to all the Departments, as to the time for making annual reports, and for furnishing copies to the printer, are contained in Rev. St. §§ 195, 196 (Comp. St. 1901, p. 97).

The printing and distribution of the report of the Comptroller of the Currency are provided for by Act Jan. 12, 1895, c. 23, § 73 (Comp. St. 1901, p. 2570).

The report of the Comptroller is to include the expenses of liquidation of failed national banks, by a provision of Act April 28, 1902, c. 594, § 1, set forth below.

ACT APRIL 28, 1902, c. 594, § 1.

Report of expenses of liquidation of national banks.—

* * That the Comptroller of the Currency is hereby directed to include in his Annual Report to the Speaker of the House of Representatives, expenses incurred during

each year, in liquidation of each failed national bank separately.

Act April 28, 1902, c. 594, § 1, 32 Stat. 138.

This is a proviso annexed to an appropriation for the office of the Comptroller of the Currency in the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1903, cited above.

SUITS INVOLVING NATIONAL BANKS

Sec. 380. Conduct of suits involving national banks.	Sec. 884. Instruments and papers of Comptroller of the Currency.
Act March 3, 1911, c. 231, § 24 (16). Jurisdiction of the district courts—Citizenship, etc.	885. Organization certificates of national banks.

Sec. 380. Conduct of suits involving national banks.—All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

Act Feb. 25, 1863, c. 58, § 55, 12 Stat. 680. Act June 3, 1864, c. 106, § 56, 13 Stat. 116.

ACT MARCH 3, 1911, c. 231, § 24 (16).

Jurisdiction of the district courts—Citizenship, etc.—The district courts shall have jurisdiction as follows:

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Act March 3, 1911, c. 231, § 24 (16), 36 Stat. 1092.

This section is part of an act to codify, revise, and amend the laws relating to the judiciary, which took effect January 1, 1912. Section 297 contains a list of the sections of the Revised Statutes and of acts and parts of acts repealed.

Section 49 provides that all proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

Sec. 884. Instruments and papers of Comptroller of the Currency.—Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

Act June 3, 1864, c. 106, § 2, 13 Stat. 100.

Sec. 885. Organization certificates of national banks.—Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate.

Act June 3, 1864, c. 106, § 6, 13 Stat. 101.

Provisions relating to the requisites of the certificates, and the acknowledgment and filing thereof, are contained in Rev. St. §§ 5134, 5135.

INTERNAL REVENUE—BANKS AND BANKERS

Sec.	Sec.
3407. Definition of words "bank," "banker."	21. Banks' returns; payment of tax; penalties.
3408. [Superseded in part, and remaining part repealed.]	Act March 3, 1875, c. 187.
Act March 3, 1883, c. 121.	Tax on circulation of mining or manufacturing corporations; application of Rev. St. § 3412.
1. Tax on capital and deposits of banks, and stamp taxes, repealed.	3414. Banks' and bankers' monthly returns.
3409. Taxes, when payable.	3415. In default of return, Commissioner to estimate, etc.
3410. [Superseded.]	3416. State banks converted into national banks; returns, how made.
3411. Circulation, when exempted from tax.	3417. Provisions for bank tax and returns not to apply to national banks.
3412, 3413. [Superseded.]	Act March 1, 1879, c. 125, § 22.
Act Feb. 8, 1875, c. 36, §§ 19-21.	Taxes on insolvent banks.
19. Tax on circulation of banks other than national banks.	
20. Tax on notes of State banks, municipal corporations, etc., used as circulation and paid out by banks.	

Sec. 3407. Definition of words "bank," "banker."—Every incorporated or other bank, and every person, firm, or company having a place of business where credits are

opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker.

Act June 30, 1864, c. 173, § 79, 13 Stat. 251. Act July 13, 1866, c. 184, § 9, 14 Stat. 115.

Sec. 3408. [Superseded in part. Act Feb. 8, 1875, c. 36, § 19. Remaining part repealed and superseded. Act March 3, 1883, c. 121, § 1.]

This section contained three subsections. The first imposed a tax on deposits, the second on capital, and the third on circulation, of banking institutions. The first and second subsections are repealed by Act March 3, 1883, c. 121, § 1, set forth below. The third subsection is superseded by Act Feb. 8, 1875, c. 36, § 19, post, under Rev. St. § 3412.

The special taxes imposed on bankers by the war revenue act, Act June 13, 1898, c. 448, § 2, and the amendment thereto by Act March 2, 1901, c. 806, § 2 (Comp. St. 1901, p. 2286), are abrogated by the repeal of that section by Act April 12, 1902, c. 500, § 2 (Comp. St. Supp. 1911, p. 977).

Taxation of national banks is provided for by Rev. St. §§ 5214-5219, and subsequent provisions set forth under those sections.

ACT MARCH 3, 1883, c. 121.

An Act to Reduce Internal Revenue Taxation, and for Other Purposes. (22 Stat. 488.)

Tax on capital and deposits of banks, and stamp taxes, repealed.—Be it enacted, &c., That the taxes herein specified imposed by the laws now in force be, and the same are hereby, repealed, as hereinafter provided, namely: On capital and deposits of banks, bankers, and national banking associations, except such taxes as are now due and payable; and on and after the first day of July, eighteen hundred and eighty-three, the stamp tax on bank checks, drafts, orders, and vouchers, and the tax on matches, perfumery, medicinal preparations, and other articles imposed by Schedule A following section thirty-four hundred and thirty-seven of the Revised Statutes: * * [Part of section omitted temporary.]

Act March 3, 1883, c. 121, § 1, 22 Stat. 488.

The taxes on capital and deposits of banks, etc., repealed by this section, are those imposed by Rev. St. § 3408, subsecs. 1, 2.

The stamp taxes, also repealed by this section, are those imposed by Rev. St. §§ 3418, 3419 (Comp. St. 1901, p. 2252).

Sec. 3409. Taxes, when payable.—The taxes provided in the preceding section shall be paid semiannually, on the first day of January and the first day of July; but the same shall be calculated at the rate per month as prescribed by said section, so that the tax for six months shall not be less than the aggregate would be if such taxes were collected monthly.

Act June 30, 1864, c. 173, § 110, 13 Stat. 277. Act July 13, 1866, c. 184, § 9, 14 Stat. 146. Act June 6, 1872, c. 315, § 37, 17 Stat. 256.

The preceding section is either repealed or superseded. See note under that section.

The tax on bank circulation imposed by Act Feb. 8, 1875, c. 36, § 19, post, under Rev. St. § 3412, is required to be paid at the time and in the manner provided by law for the payment of taxes on deposits, capital, and circulation by section 21 of said act, also set forth under Rev. St. § 3412.

Sec. 3410. [Superseded. Act March 3, 1883, c. 121, § 1.]

This section provided that the capital of a State bank ceasing to exist, or being converted into a national bank, should be assumed to be the capital as it existed immediately before such bank ceased to exist or was so converted. It is superseded by Act March 3, 1883, c. 121, § 1, ante, under Rev. St. § 3408.

Sec. 3411. Circulation, when exempted from tax.—Whenever the outstanding circulation of any bank, association, corporation, company, or person is reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation deposits in the Treasury of the United States, in lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation.

Act March 3, 1865, c. 78, § 14, 13 Stat. 486. Act July 13, 1866, c. 184, § 9 bis, 14 Stat. 146.

Secs. 3412, 3413. [Superseded. Act Feb. 8, 1875, c. 36, § 20.]

Section 3412 required banks to pay a tax on the amount of notes of a person or State bank or State banking association used for circulation and paid out by them. It is construed, as to its application to pending cases, by Act March 3, 1875, c. 167, set forth below.

Section 3413 required banks to pay a tax on the amount of notes of municipal corporations paid out by them.

Both these sections are superseded by Act Feb. 8, 1875, c. 36, § 20, set forth below.

ACT FEB. 8, 1875, c. 36, §§ 19-21.

Tax on circulation of banks other than national banks.—Sec. 19. That every person, firm, association other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them.

Act Feb. 8, 1875, c. 36, § 19, 18 Stat. 311.

This section supersedes Rev. St. § 3408, subsec. 3.

Tax on notes of State banks, municipal corporations, etc., used as circulation and paid out by banks.—Sec. 20. That every such person, firm, association, corporation, State bank, or State banking association, and also every national banking association, shall pay a like tax of ten per centum on the amount of notes of any person, firm, association other than a national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them.

Act Feb. 8, 1875, c. 36, § 20, 18 Stat. 311.

This section supersedes Rev. St. §§ 3412, 3413.

Banks' returns; payment of tax; penalties.—Sec. 21. That the amount of such circulating notes, and of the tax due thereon, shall be returned, and the tax paid at the same time, and in the same manner, and with like penalties for failure to return and pay the same, as provided by law for the return and payment of taxes on deposits, capital, and circulation, imposed by the existing provisions of internal revenue law.

Act Feb. 8, 1875, c. 36, § 21, 18 Stat. 311.

Insolvent banks are not to be required to pay the tax, by Act March 1, 1879, c. 125, § 22, post, under Rev. St. § 3417.

ACT MARCH 3, 1875, c. 167.

An Act to Authorize the Secretary of the Treasury to Adjust and Remit Certain Taxes and Penalties Claimed to be Due from Mining and Other Corporations, and for Other Purposes. (18 Stat. 507.)

Tax on circulation of mining or manufacturing corporations; application of Rev. St. § 3412.—Be it enacted, &c., That the Secretary of the Treasury be, and he is hereby, authorized and directed to settle and release any claims

for tax on circulation of evidences of indebtedness made against any mining, manufacturing or other corporations other than against any national banking-association, State bank, or banking-association, by such corporations paying the tax, without penalty, that shall have accrued thereon since November first, eighteen hundred and seventy-three; and that the provisions of section three thousand four hundred and twelve of the Revised Statutes of the United States shall not be construed in pending cases, except as to national banking-associations, to apply to such evidences of indebtedness issued and reissued prior to the passage of this act, but said section shall be construed as applying to such evidences of indebtedness issued after the passage hereof.

Act March 3, 1875, c. 167, 18 Stat. 507.

Rev. St. § 3412, mentioned in this act, is superseded by a previous provision, Act Feb. 8, 1875, c. 36, § 20, set forth above.

Sec. 3414. Banks' and bankers' monthly returns.—A true and complete return of the monthly amount of circulation, of deposits, and of capital, as aforesaid, and of the monthly amount of notes of persons, town, city, or municipal corporation, State banks, or State banking associations paid out as aforesaid for the previous six months, shall be made and rendered in duplicate on the first day of December and the first day of June, by each of such banks, associations, corporations, companies, or persons, with a declaration annexed thereto, under the oath of such person, or of the president or cashier of such bank, association, corporation, or company, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful statement of the amounts subject to tax, as aforesaid; and one copy shall be transmitted to the collector of the district in which any such bank, association, corporation, or company is situated, or in which such person has his place of business, and one copy to the Commissioner of Internal Revenue.

Act June 30, 1864, c. 173, § 110, 13 Stat. 278. Act July 13, 1866, c. 184, § 9 bis, 14 Stat. 147. Act March 26, 1867, c. 8, § 2, 15 Stat. 6. Act June 6, 1872, c. 315, § 37, 17 Stat. 256. Act Dec. 24, 1872, c. 13, § 5, 17 Stat. 403.

The taxes on deposits and capital are repealed by Act March 3, 1883, c. 121, § 1, ante, under Rev. St. § 3408.

The taxes on circulation of banks other than national banks, and on banks using as circulation or paying out the notes of State banks and municipal corporations, are fixed by Act Feb. 8, 1875, c. 36, §§

19, 20, ante, under Rev. St. § 3412. Banks are required to make the returns of such circulation, as prescribed by this section, by section 21 of said act, also set forth under Rev. St. § 3412.

Sec. 3415. In default of return, Commissioner to estimate, etc.—In default of the returns provided in the preceding section, the amount of circulation, deposit, capital, and notes of persons, town, city, and municipal corporations, State banks, and State banking associations paid out, as aforesaid, shall be estimated by the Commissioner of Internal Revenue, upon the best information he can obtain. And for any refusal or neglect to make return and payment, any such bank, association, corporation, company, or person so in default shall pay a penalty of two hundred dollars, besides the additional penalty and forfeitures provided in other cases.

Act June 30, 1864, c. 173, § 110, 13 Stat. 278. Act July 13, 1866, c. 184, § 9 bis, 14 Stat. 146. Act Dec. 24, 1872, c. 13, § 2, 17 Stat. 402. See note under preceding section.

Sec. 3416. State banks converted into national banks; returns, how made.—Whenever any State bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such State bank or banking association, such national banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such State bank or banking association.

Act March 3, 1865, c. 78, § 14, 13 Stat. 486. Act July 13, 1866, c. 184, § 9 bis, 14 Stat. 146.

Sec. 3417. [As amended 1875.] Provisions for bank tax and returns not to apply to national banks.—The provisions of this chapter, relating to the tax on the deposits, capital, and circulation of banks, and to their returns, except as contained in sections thirty-four hundred and ten, thirty-four hundred and eleven, thirty-four hundred and twelve, thirty-four hundred and thirteen, and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen, and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not ap-

ply to associations which are taxed under and by virtue of Title "National Banks."

Act June 30, 1864, c. 173, § 110, 13 Stat. 278. Act July 13, 1866, c. 184, § 9 bis, 14 Stat. 146. Act Feb. 18, 1875, c. 80, 18 Stat. 319.

This section is amended by Act Feb. 18, 1875, c. 80, cited above, by inserting, among the sections mentioned, the words "thirty-four hundred and thirteen," as set forth here.

The taxes on deposits and capital are abolished by Act March 3, 1883, c. 121, § 1, ante, under Rev. St. § 3408.

Taxes are not to be paid by insolvent banks, and the taxes are to be abated from insolvent national banks, by Act March 1, 1879, c. 125, § 22, set forth below.

ACT MARCH 1, 1879, c. 125, § 22.

Taxes on insolvent banks.—That whenever and after any bank has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall so appear to him, is authorized to remit so much of said tax against insolvent State and savings banks as shall be found to affect the claims of their depositors. * * [Part of section omitted superseded. Act March 3, 1883, c. 121, § 1.]

Act March 1, 1879, c. 125, § 22, 20 Stat. 351.

The part of this section omitted related to the tax on deposits of savings banks. It is superseded by Act March 3, 1883, c. 121, § 1, ante, under Rev. St. § 3408.

MISCELLANEOUS

Sec.

3473. Duties and other debts to the United States, in what currency to be paid.

3475. National bank notes receivable for debts of United States, except.

Act June 23, 1874, c. 455, § 1.

Maceration of national bank notes, etc.

Sec.

Act June 30, 1876, c. 156, § 5.

Counterfeit notes to be marked.

Act Aug. 13, 1894, c. 281.

1. State taxation of national bank notes, etc.

2. Taxation of national banks not affected by act.

Sec. 3473. [As amended 1877.] Duties and other debts to the United States, in what currency to be paid.—All duties on imports shall be paid in gold and silver coin only, coin certificates or in demand Treasury notes, issued under the authority of the acts of July seventeen, eighteen hundred and sixty-one, chapter five; and February twelve,

eighteen hundred and sixty-two, chapter twenty; and all taxes and all other debts and demands than duties on imports, accruing or becoming due to the United States, shall be paid in gold and silver coin, Treasury notes, United States notes, or notes of national banks.

Act Aug. 6, 1846, c. 90, § 18, 9 Stat. 64. Act Dec. 23, 1857, c. 1, § 6, 11 Stat. 258. Act July 17, 1861, c. 5, § 1, 12 Stat. 259. Act Aug. 5, 1861, c. 46, § 5, 12 Stat. 313. Act Feb. 12, 1862, c. 20, 12 Stat. 338. Act Feb. 25, 1862, c. 33, §§ 1, 5, 12 Stat. 345, 346. Act July 11, 1862, c. 142, § 1, 12 Stat. 532. Act March 3, 1863, c. 73, §§ 1, 5, 12 Stat. 710, 711. Act June 3, 1864, c. 106, § 23, 13 Stat. 106. Act June 30, 1864, c. 172, § 2, 13 Stat. 218.

This section is amended by Act Feb. 27, 1877, c. 69, 19 Stat. 249, by inserting, after the words "gold and silver coin only," the words "coin certificates," and by striking out, after the words "notes of national banks," the words at the end of the section as originally enacted, "and upon every such payment credit shall be given for the amount of principal and interest due on any Treasury note not received in payment on the day when the same are received."

Sec. 3475. National bank notes receivable for debts of United States, except.—The notes of national banks shall be received at par for all debts and demands owing by the United States to any person within the United States, except interest on the public debt, or in redemption of the national currency.

Act June 3, 1864, c. 106, § 23, 13 Stat. 106.

National bank notes shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency,—by Rev. St. § 5182.

ACT JUNE 23, 1874, c. 455, § 1.

Maceration of national bank notes, etc.— * * For the maceration of national bank notes, United States notes, and other obligations of the United States authorized to be destroyed * * ; and that all such issues hereafter destroyed may be destroyed by maceration instead of burning to ashes, as now provided by law; and that so much of sections twenty-four and forty-three of the national-currency act as requires national bank notes to be burned to ashes is hereby repealed; that the pulp from such macerated issue shall be disposed of only under the direction of the Secretary of the Treasury.

Act June 23, 1874, c. 455, § 1, 18 Stat. 206 (Comp. St. 1901, p. 2396).

This is a provision of the sundry civil appropriation act for the fiscal year ending June 30, 1875, cited above.

The provisions of the national currency act mentioned in this paragraph, Act June 3, 1864, c. 106, §§ 24, 43, are incorporated in Rev. St. §§ 5184, 5225. They provide for the destruction by burning of worn-out or mutilated circulating bank notes and notes of insolvent banks.

ACT JUNE 30, 1876, c. 156, § 5.

Counterfeit notes to be marked.—That all United States officers charged with the receipt or disbursement of public moneys, and all officers of national banks, shall stamp or write in plain letters the word "counterfeit" "altered" or "worthless," upon all fraudulent notes issued in the form of, and intended to circulate as money, which shall be presented at their places of business; and if such officers shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face value thereof.

Act June 30, 1876, c. 156, § 5, 19 Stat. 64.

This section is part of an act relating to receiverships of national banks, other sections of which are set forth post, after Rev. St. § 5238.

ACT AUG. 13, 1894, c. 281.

An Act to Subject to State Taxation National Bank Notes and United States Treasury Notes. (28 Stat. 278.)

State taxation of national bank notes, etc.—Be it enacted, &c., That circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency and gold, silver or other coin shall be subject to taxation as money on hand or on deposit under the laws of any State or Territory: Provided, That any such taxation shall be exercised in the same manner and at the same rate that any such State or Territory shall tax money or currency circulating as money within its jurisdiction.

Act Aug. 13, 1894, c. 281, § 1, 28 Stat. 278.

Taxation of national banks not affected by act.—Sec. 2. That the provisions of this Act shall not be deemed or held to change existing laws in respect of the taxation of national banking associations.

Act Aug. 13, 1894, c. 281, § 2, 28 Stat. 278.

TITLE LXII (REVISED STATUTES).—NATIONAL BANKS

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CHAPTER ONE—ORGANIZATION AND POWERS

Sec.	Sec.
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5134. Requisites of organization certificate.	5138. Requisite amount of capital.
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10. [Superseded.]	Act May 30, 1908, c. 229.
11. [Relates to exchange of bonds.]	14. Provisions relating to reserves of national banks not to apply to deposits of public moneys in designated depositaries.
12. [Relates to gold certificates.]	15. Rate of interest on special and additional deposits in national banks designated as depositaries.
13. [Relates to false certification of checks.]	5154. Organization of State banks as national banking associations.
14. Reservation of power to amend, alter, or repeal act.	5155. State banks having branches.
Act April 12, 1902, c. 503.	5156. Reservation of rights of associations organized under act of 1863.

Sec. 5133. Formation of national banking associations.—Associations for carrying on the business of banking under this Title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

Act June 3, 1864, c. 106, § 5, 13 Stat. 100.

The act entitled "An Act to Provide a National Currency Secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption Thereof," Act June 3, 1864, c. 106, 13 Stat. 99-118, constituting the greater part of this Title, is designated as the "national-bank act" by Act June 20, 1874, c. 343, § 1, set forth below.

Provisions relating to the Comptroller of the Currency are contained, ante, in Rev. St. §§ 324-333.

National gold banks may be converted into currency banks authorized by this section, by Act Feb. 14, 1880, c. 25, post, following Rev. St. § 5186.

ACT JUNE 20, 1874, c. 343, § 1.

The "national-bank act."—Be it enacted, &c., That the act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, eighteen hundred and sixty-four, shall hereafter be known as "the national-bank act."

Act June 20, 1874, c. 343, § 1, 18 Stat. 123.

This section is part of an act fixing the amount of United States notes, providing for the redistribution of the national bank currency, etc. Other sections are set forth or referred to, post, under Rev. St. § 5192.

Act June 3, 1864, c. 106, 13 Stat. 99, mentioned in this section, is incorporated into this Title of the statutes, constituting the greater part thereof.

Sec. 5134. Requisites of organization certificate.—The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title.

Act June 3, 1864, c. 106, § 6, 13 Stat. 101.

Provisions authorizing national banks to change their names or locations are contained in Act May 1, 1886, c. 73, set forth below.

Sec. 5135. How certificate shall be acknowledged and filed.—The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

Act June 3, 1864, c. 106, § 6, 13 Stat. 101.

Copies of organization certificates certified and authenticated by the Comptroller of the Currency are evidence in all courts and places within the United States of the existence of the association, and of all matters which could be proved by the originals, by Rev. St. § 885, ante.

Sec. 5136. Corporate powers of associations.—Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title.

But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.

Act June 3, 1864, c. 106, § 8, 13 Stat. 101.

Provisions relating to the extension of corporate succession are contained in Act July 12, 1882, c. 290, set forth below.

ACT MAY 1, 1886, c. 73.

An Act to Enable National Banking Associations to Increase their Capital Stock and to Change their Names or Locations (24 Stat. 18).

Be it enacted, etc., [Sec. 1. Relates to increase of capital stock.]

This section authorizes the increase of capital stock, and is set forth post, following Rev. St. § 5142.

Change of name or location.—Sec. 2. That any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant with the approval of the Comptrol-

ler of the Currency, by the vote of shareholders owning two-thirds of the stock of such association. A duly authenticated notice of the vote and of the new name or location selected shall be sent to the office of the Comptroller of the Currency; but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same.

Act May 1, 1886, c. 73, § 2, 24 Stat. 18.

Effect of change of name on debts, liabilities, etc.—Sec.

3. That all debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name.

Act May 1, 1886, c. 73, § 3, 24 Stat. 19.

Liabilities and suits not affected by change of name.—

Sec. 4. That nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested.

Act May 1, 1886, c. 73, § 4, 24 Stat. 19.

ACT JULY 12, 1882, c. 290.

An Act to Enable National-Banking Associations to Extend their Corporate Existence, and for Other Purposes. (22 Stat. 162.)

Extension of period of corporate succession.—Be it enacted, &c., That any national banking association organized under the acts of February twenty-fifth, eighteen hundred and sixty-three, June third eighteen hundred and sixty-four, and February fourteenth, eighteen hundred and eighty, or under sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six, and fifty-one hundred fifty-four of the Revised Statutes of the United States, may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency, to be granted, as hereinafter provided, extend its period of succession by amending its articles of association for a term of not more than twenty years from the expiration of the period of succession named in said articles

of association, and shall have succession for such extended period, unless sooner dissolved by the act of shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed.

Act July 12, 1882, c. 290, § 1, 22 Stat. 162.

Act Feb. 25, 1863, c. 58, 12 Stat. 665, mentioned in this section, is repealed by Act June 3, 1864, c. 106, 13 Stat. 99, also mentioned therein, which is incorporated into Rev. St. §§ 5133-5243. Act Feb. 14, 1880, c. 25, also mentioned in this section, is set forth post, following Rev. St. § 5186.

The Comptroller of the Currency is authorized to extend, under the provisions of this act, for a further period of 20 years, the charter of any national banking association extended under the provisions of this act, by Act April 12, 1902, c. 503, set forth below.

Procedure.—Sec. 2. That such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by the president or cashier, to the Comptroller of the Currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until the Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with, and is authorized to have succession for the extended period named in the amended articles of association.

Act July 12, 1882, c. 290, § 2, 22 Stat. 162.

Examination and issue of certificate of approval by Comptroller.—Sec. 3. That upon the receipt of the application and certificate of the association provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise, it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval.

Act July 12, 1882, c. 290, § 3, 22 Stat. 163.

Corporate powers upon extension of period of succession; jurisdiction of suits by or against national banks.—Sec. 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: Provided, however, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking association may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.

Act July 12, 1882, c. 290, § 4, 22 Stat. 163.

Provisions relating to the citizenship of national banks for purposes of actions by or against them, and to the jurisdiction of the district courts, are contained in Act March 3, 1911, c. 231, § 24 (16), ante.

Withdrawal of dissenting shareholders.—Sec. 5. That when any national-banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank

shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section: Provided, That in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares of the new association in proportion to the number of shares held by them respectively in the expiring association.

Act July 12, 1882, c. 290, § 5, 22 Stat. 163.

Redemption of circulating notes issued prior to extension of period of succession.—Sec. 6: That the circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the Treasury of the United States, as provided in section three of the act of June twentieth, eighteen hundred and seventy-four, entitled "An act fixing the amount of United States notes, providing for redistribution of national-bank currency, and for other purposes," and such notes when redeemed shall be forwarded to the Comptroller of the Currency, and destroyed as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the Treasurer of the United States sufficient to redeem the remainder of the circulation which was outstanding at the date of its extension, as provided in sections fifty-two hundred and twenty-two, fifty-two hundred and twenty-four, and fifty-two hundred and twenty-five of the Revised Statutes; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided by this act, bearing such devices, to be approved by the Secretary of the Treasury, as shall make them readily distinguishable from the circulating notes

heretofore issued: Provided, however, That each banking association which shall obtain the benefit of this act shall reimburse to the Treasury the cost of preparing the plate or plates for such new circulating notes as shall be issued to it.

Act July 12, 1882, c. 290, § 6, 22 Stat. 163.

Act June 20, 1874, c. 343, § 3, mentioned in this section, relates to the redemption of circulating notes, and is set forth post, following Rev. St. § 5192.

The method of destroying bank notes by burning, as provided in Rev. St. §§ 5184, 5225, is superseded by Act June 23, 1874, c. 455, § 1 (Comp. St. 1901, p. 2396), ante, which requires all bank notes, etc., to be macerated instead of burned.

Dissolution of banks not extending period of succession.

—Sec. 7. That national-banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections fifty-two hundred and twenty-one and fifty-two hundred and twenty-two of the Revised Statutes in the same manner as if the shareholders had voted to go into liquidation, as provided in section fifty-two hundred and twenty of the Revised Statutes; and the provisions of sections fifty-two hundred and twenty-four and fifty-two hundred and twenty-five of the Revised Statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such association is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed.

Act July 12, 1882, c. 290, § 7, 22 Stat. 164.

Sec. 8. [Relates to bond deposits and circulating notes.]

This section relates to the bond deposits and circulating notes of certain banks, and is set forth post, following Rev. St. § 5167.

Sec. 9. [Relates to withdrawal of circulating notes.]

This section relates to the deposit of "lawful money" and the withdrawal of circulating notes, and is set forth post, following Rev. St. § 5167.

Sec. 10. [Superseded. Act March 14, 1900, c. 41, § 12.]

This section repealed Rev. St. §§ 5171, 5176, and prescribed and regulated the issue of circulating notes. It is superseded by Act March 14, 1900, c. 41, § 12, post, following Rev. St. § 5171. See, also, note under that section.

Sec. 11. [Relates to exchange of bonds.]

This section provides for the exchange, for outstanding three and one-half per cent. bonds of the United States, of three per cent.

bonds, and is set forth Comp. St. 1901, p. 2478, following Rev. St. § 3697.

Sec. 12. [Relates to gold certificates.]

This section authorizes the issue of gold certificates upon the deposit of gold coin, and is set forth Comp. St. 1901, p. 140, following Rev. St. § 254.

Sec. 13. [Relates to false certification of checks.]

This section provides for the punishment of bank officers, etc., for falsely certifying checks, and is set forth post, following Rev. St. § 5208.

Reservation of power to amend, alter or repeal act.—Sec.

14. That Congress may at any time amend, alter, or repeal this act and the acts of which this is amendatory.

Act July 12, 1882, c. 290, § 14, 22 Stat. 166.

ACT APRIL 12, 1902, c. 503.

An Act to Provide for the Extension of the Charters of National Banks. (32 Stat. 102.)

Additional extension of period of corporate succession.—

Be it enacted, &c., That the Comptroller of the Currency is hereby authorized, in the manner provided by, and under the conditions and limitations of, the Act of July twelfth, eighteen hundred and eighty-two, to extend for a further period of twenty years the charter of any national banking association extended under said Act which shall desire to continue its existence after the expiration of its charter.

Act April 12, 1902, c. 503, 32 Stat. 102.

Act July 12, 1882, c. 290, mentioned in this act, is set forth above.

Sec. 5137. Power to hold real property.—A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of

any real estate purchased to secure any debts due to it, for a longer period than five years.

Act June 3, 1864, c. 106, § 28, 13 Stat. 107.

Sec. 5138. [*As amended 1900.*] **Requisite amount of capital.**—No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars.

Act June 3, 1864, c. 106, § 7, 13 Stat. 101. Act March 14, 1900, c. 41, § 10, 31 Stat. 48.

This section is amended by Act March 14, 1900, c. 41, § 10, cited above, by adding, after the words "six thousand inhabitants," the clause beginning with the words "and except that banks," and ending with the words "three thousand inhabitants."

Sec. 5139. Shares of stock and transfers.—The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Act June 3, 1864, c. 106, § 12, 13 Stat. 102.

Sec. 5140. How payment of the capital stock must be made and proved.—At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum each, on the whole amount of the capital, as frequently as one installment at the end

of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

Act June 3, 1864, c. 106, § 14, 13 Stat. 103.

Sec. 5141. Proceedings if shareholder fails to pay installments.—Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

Act June 3, 1864, c. 106, § 15, 13 Stat. 103.

Sec. 5142. Increase of capital stock.—Any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital

shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

Act June 3, 1864, c. 106, § 13, 13 Stat. 103.

Other provisions for the increase of capital stock are contained in Act May 1, 1886, c. 73, § 1, set forth below.

ACT MAY 1, 1886, c. 73, § 1.

Increase of capital stock.—That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided.

Act May 1, 1886, c. 73, § 1, 24 Stat. 18.

This section is part of an act to enable national banks to increase their capital stock, etc., other sections of which are set forth ante, following Rev. St. § 5136.

Sec. 5143. Reduction of capital stock.—Any association formed under this Title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this Title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained.

Act June 3, 1864, c. 106, § 13, 13 Stat. 103.

Sec. 5144. Right of shareholders to vote.—In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no

officer, clerk, teller, or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

Act June 3, 1864, c. 106, § 11, 13 Stat. 102.

Sec. 5145. Election of directors.—The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.

Act June 3, 1864, c. 106, §§ 9, 10, 13 Stat. 102.

Sec. 5146. [Amended. Act Feb. 28, 1905, c. 1163.]

This section is amended by Act Feb. 28, 1905, c. 1163, to read as set forth below.

ACT FEB. 28, 1905, c. 1163. [S. 7065.]

An Act to Amend Section Fifty-One Hundred and Forty-Six of the Revised Statutes of the United States in Relation to the Qualifications of Directors of National Banking Associations. (33 Stat. 818.)

Amendment of Rev. St. § 5146.—Be it enacted, &c., That section fifty-one hundred and forty-six of the Revised Statutes of the United States be so amended as to read as follows:

Requisite qualifications of directors.—Sec. 5146. Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located for at least one year immediately preceding their election and must be residents therein during their continuance in office. Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director, unless the capital of the bank shall not exceed twenty-five thousand dollars, in which case he must own in his own right at least five shares of such capital stock. Any director who ceases to be the owner of the required number of

shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

Act Feb. 28, 1905, c. 1163, 33 Stat. 818.

Rev. St. § 5146 (Act June 3, 1864, c. 106, §§ 9, 10, 13 Stat. 102), amended by this act, is set forth in Comp. St. 1901, p. 3463. The amendment consists in the addition, at the end of the second sentence of the section as originally enacted, "Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director," of the words, "unless the capital of the bank shall not exceed twenty-five thousand dollars, in which case he must own in his own right at least five shares of such capital stock"; and in the insertion, in the last sentence, after the words, "Any director who ceases to be the owner of," instead of the word "ten," of the words "the required number of," as set forth here.

Sec. 5147. Oath required from directors.—Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his Office.

Act June 3, 1864, c. 106, § 9, 13 Stat. 102.

Sec. 5148. Filling vacancies.—Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

Act June 3, 1864, c. 106, § 10, 13 Stat. 102.

Sec. 5149. Proceedings where no election is held on the proper day.—If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such

notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two-thirds of the shares may do so.

Act June 3, 1864, c. 106, § 10, 13 Stat. 102.

Sec. 5150. Election of president of the board.—One of the directors, to be chosen by the board, shall be the president of the board.

Act June 3, 1864, c. 106, § 9, 13 Stat. 102.

Sec. 5151. Individual liability of shareholders.—The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of Chapter four of this Title.

Act June 3, 1864, c. 106, § 12, 13 Stat. 102.

The enforcement of the liability prescribed by this section by a creditors' bill or bill in equity in cases of voluntary liquidation under Rev. St. § 5220, is authorized by Act June 30, 1876, c. 156, § 2, set forth post, following Rev. St. § 5238.

Sec. 5152. Executors, trustees, etc., not personally liable.—Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in

their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name.

Act June 3, 1864, c. 106, § 63, 13 Stat. 118.

Sec. 5153. [*As amended* 1901.] [Amended Act March 4, 1907, c. 2913, § 3.]

This section is amended by Act March 4, 1907, c. 2913, § 3, to read as set forth below.

ACT MARCH 4, 1907, c. 2913. [H. R. 13566.]

An Act to Amend the National Banking Act, and for Other Purposes. (34 Stat. 1289.)

Be it enacted, &c., [Section 1 amends Act March 14, 1900, c. 41, § 6.]

This section amends Act March 14, 1900, c. 41, § 6, Comp. St. 1901, p. 141, authorizing the Secretary of the Treasury to receive deposits of gold coin and to issue gold certificates therefor. It is set forth Comp. St. Supp. 1911, p. 53.

Sec. 2. [Authorizes issue of United States notes of small denominations when silver certificates are insufficient.]

This section authorizes the Secretary of the Treasury, when the outstanding silver certificates of certain small denominations issued under Act March 14, 1900, c. 41, Comp. St. 1901, pp. 2356-2360, are, in his opinion, insufficient to meet the public demand therefor, to issue United States notes of such denominations, an equal amount of notes of higher denominations to be retired. It is set forth Comp. St. Supp. 1911, p. 994.

Amendment of Rev. St. § 5153.—Sec. 3. That section fifty-one hundred and fifty-three of the Revised Statutes be amended to read as follows:

Duties and liabilities when designated as depositaries of public moneys.—Sec. 5153. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping

and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Act March 4, 1907, c. 2913, § 3, 34 Stat. 1290.

Rev. St. § 5153 (Act June 3, 1864, c. 106, § 45, 13 Stat. 113), set forth, as previously amended by Act March 3, 1901, c. 871, § 3, in Comp. St. 1901, p. 3465, is further amended by this section to read as set forth here. The amendment consists principally in the omission, after the words "shall be depositaries of public money," of the words contained in the section as originally enacted, "except receipts from customs;" the omission also, after the words "under such regulations as may be prescribed by the Secretary," of the words inserted by amendment by said Act March 3, 1901, c. 871, § 3, "but receipts derived from duties on imports in Alaska, the Hawaiian Islands, and other islands under the jurisdiction of the United States may be deposited in such depositaries subject to such regulations;" the insertion of the proviso "That the Secretary of the Treasury shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits;" and the addition, at the end of the section as originally enacted, of the proviso "That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections."

The provisions of Rev. St. § 5191, post, relating to reserves of national banks, are not to apply to deposits of public moneys in designated depositaries, by Act May 30, 1908, c. 229, § 14, set forth below.

Provisions as to the rate of interest payable on deposits of public moneys in national banks designated as depositaries are contained in Act May 30, 1908, c. 229, § 15, set forth below.

As to the provisions of sections 1, 2, of said Act March '4, 1907, c. 2913, see Comp. St. Supp. 1911, p. 1515.

Sec. 4. [Amends Act July 12, 1882, c. 290, § 9.]

This section amends Act July 12, 1882, c. 290, § 9, as amended by Act March 14, 1900, c. 41, § 12, Comp. St. 1901, p. 3473, providing for withdrawal, by a national banking association, of its circulating notes, on deposit of lawful money, and withdrawal of bonds held as security for such notes. The section so amended is again amended

by Act May 30, 1908, c. 229, § 10, which is set forth, with said section as further amended, post, under Rev. St. § 5167.

Other provisions relating to the duties and liabilities of depositaries are contained in Rev. St. §§ 3640-3649. See, also, Comp. St. Supp. 1911, pp. 1015-1018.

Provisions defining and punishing the embezzlement of public moneys by any public depositary are contained in Act March 4, 1909, c. 321, § 88, Comp. St. Supp. 1911, p. 1615.

As to deposits of Indian moneys, see Act April 30, 1908, c. 153, § 1, 35 Stat. 73 (Comp. St. Supp. 1911, p. 91).

ACT MAY 30, 1908, c. 229, § 14, 15. [H. R. 21871.]

Provisions relating to reserves of national banks not to apply to deposits of public moneys in designated depositaries.—Sec. 14. That the provisions of section fifty-one hundred and ninety-one of the Revised Statutes, with reference to the reserves of national banking associations, shall not apply to deposits of public moneys by the United States in designated depositaries.

Act May 30, 1908, c. 229, § 14, 35 Stat. 552.

This section and the section next following are part of an act to amend the national banking laws, cited above, the other sections of which are set forth or referred to post, under Rev. St. § 5167.

Rate of interest on special and additional deposits in national banks designated as depositaries.—Sec. 15. That all national banking associations designated as regular depositaries of public money shall pay upon all special and additional deposits made by the Secretary of the Treasury in such depositaries, and all such associations designated as temporary depositaries of public money shall pay upon all sums of public money deposited in such associations interest at such rate as the Secretary of the Treasury may prescribe, not less, however, than one per centum per annum upon the average monthly amount of such deposits: Provided, however, That nothing contained in this Act shall be construed to change or modify the obligation of any association or any of its officers for the safe-keeping of public money: Provided further, That the rate of interest charged upon such deposits shall be equal and uniform throughout the United States.

Act May 30, 1908, c. 229, § 15, 35 Stat. 552.

See note under preceding section of this act.

Sec. 5154. Organization of State banks as national banking associations.—Any bank incorporated by special law, or any banking institution organized under a gen-

eral law of any State, may become a national association under this Title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this Title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this Title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this Title.

Act June 3, 1864, c. 106, § 44, 13 Stat. 112.

Provisions relating to the conversion of national gold banks into currency banks are contained in Act Feb. 14, 1880, c. 25, post, following Rev. St. § 5186.

Sec. 5155. State banks having branches.—It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother-bank and

branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother-bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

Act March 3, 1865, c. 78, § 7, 13 Stat. 484.

Sec. 5156. Reservation of rights of associations organized under act of 1863.—Nothing in this Title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any national banking association under the act of February twenty-five, eighteen hundred and sixty-three; but all associations which, on the third day of June, eighteen hundred and sixty-four, were organized or commenced to be organized under that act, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this Title, notwithstanding all the steps prescribed by this Title for the organization of associations were not pursued, if such associations were duly organized under that act.

Act June 3, 1864, c. 106, § 62, 13 Stat. 118.

CHAPTER TWO—OBTAINING AND ISSUING CIRCULATING NOTES

Sec.	Sec.
5157. What associations are governed by chapters 2, 3, and 4.	5166. Annual examination of bonds by associations.
5158. Registered bonds intended by the term "United States bonds."	5167. Custody of bonds, collection of interest, etc.
5159. Deposits of bonds required before issue of circulating notes.	Act June 20, 1874, c. 343, § 4.
5160. Increase or reduction of deposit to correspond with capital.	Withdrawal of circulating notes on deposit of lawful money and withdrawal of bonds.
5161. Exchange of coupon for registered bonds.	Act July 12, 1882, c. 290, §§ 8, 9.
5162. Manner of making transfers of bonds.	8. Amount of bonds required to be on deposit; reduction of amount or retirement in full of circulating notes.
5163. Registry of transfers.	9. [As amended, Act March 4, 1907, c. 2913, § 4, and Act May 30, 1908, c. 229, § 10.] Withdrawal of circulating notes on deposit of
5164. Notice of transfer to be given to association interested.	
5165. Examination of registry and bonds.	

Sec.

lawful money, etc., and withdrawal of bonds or other securities.

Act May 30, 1908, c. 229.

1. National currency associations; formation by national banks; officers; powers; additional circulating notes on deposit of securities; liability of banks and lien on assets for redemption of notes, and remedies for enforcement.
2. Failure of bank belonging to association to preserve or make good redemption fund; application of fund belonging to other banks; sale of securities deposited by bank with association.
3. Issue of additional circulating notes on deposit of bonds, other than United States bonds; bonds, etc., that may be accepted as security.
4. Bonds deposited under section 3 to be transferred to Treasurer; receipts; assignments; application of provisions relating to registry, notice of transfers, examinations and custody, etc., of bonds.
5. Status of additional circulating notes; limitations of amount.
6. Additional redemption fund for additional circulating notes outstanding.
7. Distribution of additional circulating notes proportionate to capital and surplus of national banks in each state; emergency assignments of amounts not applied for.
8. Information as to securities acceptable to be obtained by Secretary of the Treasury and furnished to national banks.
9. [Amends Rev. St. § 5214.]
10. [Amends Act July 12, 1882, c. 290, § 9.]
11. [Amends Rev. St. § 5172.]
12. [Relates to redemption of circulating notes.]
13. Authority of Secretary of Treasury as to acts and orders of Comptroller of the Currency and organization and management of associations.
- 14, 15. [Relate to deposits of public moneys in national banks.]

Sec.

16. Appropriation.

17-19. [Relate to "National Monetary Commission."]

20. Limitation of act.

5168. Comptroller to determine if associations can commence business.
5169. Certificate of authority to commence banking to be issued.
5170. Publication of certificate.
5171. [Repealed.]
- Act March 14, 1900, c. 41, § 12. Delivery of circulating notes.
5172. [As amended, Act May 30, c. 229, § 11.] Printing, denominations, and form of the circulating notes, etc.
- Act June 20, 1874, c. 343, § 5. Charter-numbers to be printed on notes.
- Act March 3, 1875, c. 130, § 1. Distinctive paper for printing notes.
5173. Plates and dies to be under control of Comptroller.
5174. Annual examination of plates, dies, etc.
5175. Limit to issue of notes under five dollars.
5176. [Repealed.]
5177. [Repealed.]
- Act Jan. 14, 1875, c. 15, § 3. Aggregate amount of circulating notes not limited.
5178. [Superseded.]
5179. [Superseded.]
5180. [Repealed.]
5181. [Superseded.]
5182. For what demands national bank notes may be received.
5183. Issue of other notes prohibited.
5184. Destroying and replacing worn-out and mutilated notes.
5185. Organization of associations to issue gold notes authorized.
- Act Jan. 19, 1875, c. 19. Removal of limitation on circulation of gold banks.
5186. Their lawful money reserve, and duty of receiving notes of other associations.
- Act Feb. 14, 1880, c. 25. Conversion of national gold banks into currency banks.
5187. Penalty for issuing circulating notes to unauthorized associations.
5188. [Repealed.]
5189. [Repealed.]

Sec. 5157. What associations are governed by chapters 2, 3, and 4.—The provisions of chapters two, three, and four of this Title, which are expressed without restrictive words, as applying to “national banking associations,” or to “associations,” apply to all associations organized to carry on the business of banking under any act of Congress.

Sec. 5158. Registered bonds intended by the term “United States bonds.”—The term “United States bonds,” as used throughout this chapter, shall be construed to mean registered bonds of the United States.

Act June 3, 1864, c. 106, § 4, 13 Stat. 100.

Sec. 5159. Deposit of bonds required before issue of circulating notes.—Every association, after having complied with the provisions of this Title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasurer of the United States any United States registered bonds, bearing interest, to an amount not less than thirty thousand dollars and not less than one-third of the capital stock paid in. Such bonds shall be received by the Treasurer upon deposit, and shall be by him safely kept in his office, until they shall be otherwise disposed of, in pursuance of the provisions of this Title.

Act June 3, 1864, c. 106, § 16, 13 Stat. 104.

Banks having a capital of \$150,000, or less, are not required to keep on deposit bonds in excess of one-fourth of the capital stock as security for their circulating notes, by Act July 12, 1882, c. 290, § 8, post, following Rev. St. § 5167.

The issue of additional circulating notes, on deposit of securities other than United States bonds, is authorized by provisions of Act May 30, 1908, c. 229, set forth post, under Rev. St. § 5167.

Panama canal bonds, issued under Act Aug. 5, 1909, c. 6, § 39, 36 Stat. 117 (Comp. St. Supp. 1911, p. 1053), are not receivable by the Treasurer of the United States for the issue of circulating notes. Act March 2, 1911, c. 195, 36 Stat. 1013.

Sec. 5160. Increase or reduction of deposit to correspond with capital.—The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount of at least one-third of its capital stock actually paid in. And any association that may de-

sire to reduce its capital or to close up its business and dissolve its organization, may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond one-third of its capital stock, and upon which no circulating notes have been delivered.

Act June 3, 1864, c. 106, § 16, 13 Stat. 104.

Sec. 5161. Exchange of coupon for registered bonds.—To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run.

Act June 3, 1864, c. 106, § 16, 13 Stat. 104.

Sec. 5162. Manner of making transfers of bonds.—All transfers of United States bonds, made by any association under the provisions of this Title, shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency.

Act June 3, 1864, c. 106, § 19, 13 Stat. 105.

Sec. 5163. Registry of transfers.—The Comptroller of the Currency shall keep in his Office a book in which he shall cause to be entered, immediately upon countersigning it, every transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, presented for his signature. He shall state in such entry the name of the association from whose accounts the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred.

Act June 3, 1864, c. 106, §§ 19, 20, 13 Stat. 105.

Sec. 5164. Notice of transfer to be given to association interested.—The Comptroller of the Currency shall, immediately upon countersigning and entering any transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, advise by mail the association from whose accounts the transfer is made, of the kind and numerical designation of the bonds, and the amount thereof so transferred.

Act June 3, 1864, c. 106, § 19, 13 Stat. 105.

Sec. 5165. Examination of registry and bonds.—The Comptroller of the Currency shall have at all times, during office-hours, access to the books of the Treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the Comptroller to countersign; and the Treasurer shall have the like access to the book mentioned in section fifty-one hundred and sixty-three, during office-hours, to ascertain the correctness of the entries in the same; and the Comptroller shall also at all times have access to the bonds on deposit with the Treasurer, to ascertain their amount and condition.

Act June 3, 1864, c. 106, § 20, 13 Stat. 105.

Sec. 5166. Annual examination of bonds by associations.—Every association having bonds deposited in the office of the Treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the Comptroller of the Currency and with the accounts of the association, and, if they are found correct, to execute to the Treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the Treasurer at the date of the certificate. Such examination shall be made at such time or times, during the ordinary business hours, as the Treasurer and the Comptroller, respectively, may select, and may be made by an officer or agent of such association, duly appointed in writing for that purpose; and his certificate before mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of such certificate, signed by the Treasurer, shall be retained by the association.

Act June 3, 1864, c. 106, § 25, 13 Stat. 106.

Sec. 5167. Custody of bonds, collection of interest, etc.
—The bonds transferred to and deposited with the Treasurer of the United States, by any association, for the security of its circulating notes, shall be held exclusively for that purpose, until such notes are redeemed, except as provided in this Title. The Comptroller of the Currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the Treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the Treasurer is reduced below the amount of the circulation issued for the same, the Comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as such depreciation continues. And the Comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the Treasurer by any association, for other bonds of the United States authorized to be received as security for circulating notes, if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: Provided, That the remaining bonds which shall have been transferred by the association offering to surrender circulating notes are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the hands of the Treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this Title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same.

Act June 3, 1864, c. 106, § 26, 13 Stat. 107.

This section is not affected by Act March 14, 1900, c. 41, § 12, post, following Rev. St. § 5171.

Provisions authorizing the deposit of lawful money, the return of bonds deposited, and the withdrawal, in whole or in part, of the cir-

culating notes, are contained in Act June 20, 1874, c. 743, § 4, and Act July 12, 1882, c. 290, § 9, set forth below.

ACT JUNE 20, 1874, c. 343, § 4.

Withdrawal of circulating notes on deposit of lawful money and withdrawal of bonds.—That any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes; which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the national-bank act; and the outstanding notes of said association, to an amount equal to the legal-tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: Provided, That the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars.

Act June 20, 1874, c. 343, § 4, 18 Stat. 124.

This section is part of an act fixing the amount of the United States notes, etc., other sections of which are set forth or referred to post, under Rev. St. § 5192.

Section 19 of the national bank act, referred to in this section, was incorporated into Rev. St. §§ 5162-5164.

Other provisions relating to the withdrawal of circulating notes are contained in Act July 12, 1882, c. 290, § 9, as amended by Act May 30, 1908, c. 229, § 10, set forth below.

ACT JULY 12, 1882, c. 290, § 8.

Amount of bonds required to be on deposit; reduction of amount or retirement in full of circulating notes.—Sec. 8. That national banks now organized or hereafter organized, having a capital of one hundred and fifty thousand dollars, or less, shall not be required to keep on deposit or deposit with the Treasurer of the United States United States bonds in excess of one-fourth of their capital stock as security for their circulating notes; but such banks shall keep on deposit or deposit with the Treasurer of the United States the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of that amount are authorized to reduce their circulation by the deposit of lawful money as provided by law; provided, That the

amount of such circulating notes shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided: Provided further, That the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall at the time of their deposit be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national-bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed and shall pay an assessment in the manner specified in section three of the act approved June twentieth, eighteen hundred and seventy-four, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June thirtieth, eighteen hundred and eighty-one.

Act July 12, 1882, c. 290, § 8, 22 Stat. 164.

The limitation of the circulation to not to exceed 90 per centum of the bonds deposited is superseded by Act March 14, 1900, c. 41, § 12, post, following Rev. St. § 5171.

Act June 20, 1874, c. 343, § 3, mentioned in this section, is set forth post, following Rev. St. § 5192.

Section 9 of said Act July 12, 1882, c. 290, set forth, as amended by the repeal of part thereof by Act March 14, 1900, c. 41, § 12, in Comp. St. 1901, p. 3473, is further amended by Act March 4, 1907, c. 2913, § 4, and by Act May 30, 1908, c. 229, § 10, to read as set forth below.

ACT MAY 30, 1908, c. 229, § 10. [H. R. 21871.]

Amendment of Act July 12, 1882, c. 290, § 9.—That section nine of the Act approved July twelfth, eighteen hundred and eighty-two, as amended by the Act approved March fourth, nineteen hundred and seven, be further amended to read as follows:

Withdrawal of circulating notes on deposit of lawful money, etc., and withdrawal of bonds or other securities.—“Sec. 9. That any national banking association desiring to withdraw its circulating notes, secured by deposit of United States bonds in the manner provided in section four of the Act approved June twentieth, eighteen hundred and seventy-four, is hereby authorized for that purpose to deposit lawful money with the Treasurer of the United States and, with the consent of the Comptroller of the Currency and the approval of the Secretary of the Treasury, to withdraw

a proportionate amount of bonds held as security for its circulating notes in the order of such deposits: Provided, That not more than nine millions of dollars of lawful money shall be so deposited during any calendar month for this purpose.

"Any national banking association desiring to withdraw any of its circulating notes, secured by the deposit of securities other than bonds of the United States, may make such withdrawal at any time in like manner and effect by the deposit of lawful money or national bank notes with the Treasurer of the United States, and upon such deposit a proportionate share of the securities so deposited may be withdrawn: Provided, That the deposits under this section to retire notes secured by the deposit of securities other than bonds of the United States shall not be covered into the Treasury, as required by section six of an Act entitled 'An Act directing the purchase of silver bullion and the issue of Treasury notes thereon, and for other purposes,' approved July fourteenth, eighteen hundred and ninety, but shall be retained in the Treasury for the purpose of redeeming the notes of the bank making such deposit."

Act May 30, 1908, c. 229, § 10, 35 Stat. 551.

This section is part of an act to amend the national banking laws, the other sections of which are set forth or referred to below.

Act July 12, 1882, c. 290, § 9, amended by this section, is set forth, as previously amended by the repeal of part thereof by Act March 14, 1900, c. 41, § 12, in Comp. St. 1901, p. 3473. It was further amended by Act March 4, 1907, c. 2913, § 4, 34 Stat. 1290, to read as follows:

"That any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the Act of June twentieth, eighteen hundred and seventy-four, or as provided in this Act, is authorized to deposit lawful money and, with the consent of the Comptroller of the Currency and the approval of the Secretary of the Treasury, withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits: Provided, That not more than nine millions of dollars of lawful money shall be deposited during any calendar month for this purpose: And provided further, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to withdrawal of circulating notes in consequence thereof."

The further amendment by this act, besides making several changes in the language of the section as previously amended, added thereto the second paragraph, as set forth here, relating to withdrawal of notes secured by deposit of securities other than United States bonds;

the issue of notes on deposit of such securities being authorized by the preceding sections of this act. See Act May 30, 1908, c. 229, §§ 1-8, set forth below.

Act June 20, 1874, c. 343, § 4, mentioned in the first paragraph of this section, is set forth above.

Act July 14, 1890, c. 708, § 6, mentioned in the second paragraph of this section, is set forth post, under section 5192.

ACT MAY 30, 1908, c. 229. [H. R. 21871.]

An Act to Amend the National Banking Laws. (35 Stat. 546.)

National currency associations; formation by national banks; officers; powers; additional circulating notes on deposit of securities; liability of banks and lien on assets for redemption of notes, and remedies for enforcement.—Be it enacted, &c., That national banking associations, each having an unimpaired capital and a surplus of not less than twenty per centum, not less than ten in number, having an aggregate capital and surplus of at least five millions of dollars, may form voluntary associations to be designated as national currency associations. The banks uniting to form such association shall, by their presidents or vice-presidents, acting under authority from the board of directors, make and file with the Secretary of the Treasury a certificate setting forth the names of the banks composing the association, the principal place of business of the association, and the name of the association, which name shall be subject to the approval of the Secretary of the Treasury. Upon the filing of such certificate the associated banks therein named shall become a body corporate, and by the name so designated and approved may sue and be sued and exercise the powers of a body corporate for the purposes hereinafter mentioned: Provided, That not more than one such national currency association shall be formed in any city: Provided further, That the several members of such national currency association shall be taken, as nearly as conveniently may be, from a territory composed of a State or part of a State, or contiguous parts of one or more States: And provided further, That any national bank in such city or territory, having the qualifications herein prescribed for membership in such national currency association, shall, upon its application to and upon the approval of the Secretary of the Treasury, be admitted to membership in a national currency association for that city

or territory, and upon such admission shall be deemed and held a part of the body corporate, and as such entitled to the rights and privileges and subject to all the liabilities of an original member: And provided further, That each national currency association shall be composed exclusively of banks not members of any other national currency association.

The dissolution, voluntary or otherwise, of any bank in such association shall not affect the corporate existence of the association unless there shall then remain less than the minimum number of ten banks: Provided, however, That the reduction of the number of said banks below the minimum of ten shall not affect the existence of the corporation with respect to the assertion of all rights in favor of or against such association. The affairs of the association shall be managed by a board consisting of one representative from each bank. By-laws for the government of the association shall be made by the board, subject to the approval of the Secretary of the Treasury. A president, vice-president, secretary, treasurer, and an executive committee of not less than five members, shall be elected by the board. The powers of such board, except in the election of officers and making of by-laws, may be exercised through its executive committee.

The national currency association herein provided for shall have and exercise any and all powers necessary to carry out the purposes of this section, namely, to render available, under the direction and control of the Secretary of the Treasury, as a basis for additional circulation any securities, including commercial paper, held by a national banking association. For the purpose of obtaining such additional circulation, any bank belonging to any national currency association, having circulating notes outstanding secured by the deposit of bonds of the United States to an amount not less than forty per centum of its capital stock, and which has its capital unimpaired and a surplus of not less than twenty per centum, may deposit with and transfer to the association, in trust for the United States, for the purpose hereinafter provided, such of the securities above mentioned as may be satisfactory to the board of the association. The officers of the association may thereupon, in behalf of such bank, make application to the Comptroller of the Currency for an issue of additional circulating notes

to an amount not exceeding seventy-five per centum of the cash value of the securities or commercial paper so deposited. The Comptroller of the Currency shall immediately transmit such application to the Secretary of the Treasury with such recommendation as he thinks proper, and if, in the judgment of the Secretary of the Treasury, business conditions in the locality demand additional circulation, and if he be satisfied with the character and value of the securities proposed and that a lien in favor of the United States on the securities so deposited and on the assets of the banks composing the association will be amply sufficient for the protection of the United States, he may direct an issue of additional circulating notes to the association, on behalf of such bank, to an amount in his discretion, not, however, exceeding seventy-five per centum of the cash value of the securities so deposited: Provided, That upon the deposit of any of the State, city, town, county, or other municipal bonds of a character described in section three of this Act, circulating notes may be issued to the extent of not exceeding ninety per centum of the market value of such bonds so deposited: And provided further, That no national banking association shall be authorized in any event to issue circulating notes based on commercial paper in excess of thirty per centum of its unimpaired capital and surplus. The term "commercial paper" shall be held to include only notes representing actual commercial transactions, which when accepted by the association shall bear the names of at least two responsible parties and have not exceeding four months to run.

The banks and the assets of all banks belonging to the association shall be jointly and severally liable to the United States for the redemption of such additional circulation; and to secure such liability the lien created by section fifty-two hundred and thirty of the Revised Statutes shall extend to and cover the assets of all banks belonging to the association, and to the securities deposited by the banks with the association pursuant to the provisions of this Act; but as between the several banks composing such association each bank shall be liable only in the proportion that its capital and surplus bears to the aggregate capital and surplus of all such banks. The association may, at any time, require of any of its constituent banks a deposit of additional securities or commercial paper, or an exchange

of the securities already on deposit, to secure such additional circulation; and in case of the failure of such bank to make such deposit or exchange the association may, after ten days' notice to the bank, sell the securities and paper already in its hands at public sale, and deposit the proceeds with the Treasurer of the United States as a fund for the redemption of such additional circulation. If such fund be insufficient for that purpose the association may recover from the bank the amount of the deficiency by suit in the circuit court of the United States, and shall have the benefit of the lien hereinbefore provided for in favor of the United States upon the assets of such bank. The association or the Secretary of the Treasury may permit or require the withdrawal of any such securities or commercial paper and the substitution of other securities or commercial paper of equal value therefor.

Act May 30, 1908, c. 229, § 1, 35 Stat. 546.

Rev. St. § 5230, mentioned in the last paragraph of this section, creating a lien on the assets of any association for any deficiency in the proceeds of its bonds, deposited to secure its circulating notes, to redeem them, is set forth post.

Failure of bank belonging to national currency association to preserve or make good redemption fund; application of fund belonging to other banks; sale of securities deposited by bank with association.—Sec. 2. That whenever any bank belonging to a national currency association shall fail to preserve or make good its redemption fund in the Treasury of the United States, required by section three of the Act of June twentieth, eighteen hundred and seventy-four, chapter three hundred and forty-three and the provisions of this Act, the Treasurer of the United States shall notify such national currency association to make good such redemption fund, and upon the failure of such national currency association to make good such fund, the Treasurer of the United States may, in his discretion, apply so much of the redemption fund belonging to the other banks composing such national currency association as may be necessary for that purpose; and such national currency association may, after five days' notice to such bank, proceed to sell at public sale the securities deposited by such bank with the association pursuant to the provisions of section one of this Act, and deposit the proceeds with the Treasurer of the United States as a fund

for the redemption of the additional circulation taken out by such bank under this Act.

Act May 30, 1908, c. 229, § 2, 35 Stat. 548.

Act June 20, 1874, c. 343, § 3, mentioned in this section, providing for a redemption fund, is set forth post, following Rev. St. § 5192.

Issue of additional circulating notes on deposit of bonds, other than United States bonds; bonds, etc., that may be accepted as security.—Sec. 3. That any national banking association which has circulating notes outstanding, secured by the deposit of United States bonds to an amount of not less than forty per centum of its capital stock, and which has a surplus of not less than twenty per centum, may make application to the Comptroller of the Currency for authority to issue additional circulating notes to be secured by the deposit of bonds other than bonds of the United States. The Comptroller of the Currency shall transmit immediately the application, with his recommendation, to the Secretary of the Treasury, who shall, if in his judgment business conditions in the locality demand additional circulation, approve the same, and shall determine the time of issue and fix the amount, within the limitations herein imposed, of the additional circulating notes to be issued. Whenever after receiving notice of such approval any such association shall deposit with the Treasurer or any assistant treasurer of the United States such of the bonds described in this section as shall be approved in character and amount by the Treasurer of the United States and the Secretary of the Treasury, it shall be entitled to receive, upon the order of the Comptroller of the Currency, circulating notes in blank, registered and countersigned as provided by law, not exceeding in amount ninety per centum of the market value, but not in excess of the par value of any bonds so deposited, such market value to be ascertained and determined under the direction of the Secretary of the Treasury.

The Treasurer of the United States, with the approval of the Secretary of the Treasury, shall accept as security for the additional circulating notes provided for in this section, bonds or other interest-bearing obligations of any State of the United States, or any legally authorized bonds issued by any city, town, county, or other legally constituted municipality or district in the United States which has been in

existence for a period of ten years, and which for a period of ten years previous to such deposit has not defaulted in the payment of any part of either principal or interest of any funded debt authorized to be contracted by it, and whose net funded indebtedness does not exceed ten per centum of the valuation of its taxable property, to be ascertained by the last preceding valuation of property for the assessment of taxes. The Treasurer of the United States, with the approval of the Secretary of the Treasury, shall accept, for the purposes of this section, securities herein enumerated in such proportions as he may from time to time determine, and he may with such approval at any time require the deposit of additional securities, or require any association to change the character of the securities already on deposit.

Act May 30, 1908, c. 229, § 3, 35 Stat. 548.

Bonds deposited under section 3 to be transferred to Treasurer; receipts; assignments; application of provisions relating to registry, notice of transfers, examinations and custody, etc., of bonds.—Sec. 4. That the legal title of all bonds, whether coupon or registered, deposited to secure circulating notes issued in accordance with the terms of section three of this Act shall be transferred to the Treasurer of the United States in trust for the association depositing them, under regulations to be prescribed by the Secretary of the Treasury. A receipt shall be given to the association by the Treasurer or any assistant treasurer of the United States, stating that such bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency. The provisions of sections fifty-one hundred and sixty-three, fifty-one hundred and sixty-four, fifty-one hundred and sixty-five, fifty-one hundred and sixty-six, and fifty-one hundred and sixty-seven and sections fifty-two hundred and twenty-four to fifty-two hundred and thirty-four, inclusive, of the Revised Statutes respecting United States bonds deposited to secure circulating notes shall, except as herein modified,

be applicable to all bonds deposited under the terms of section three of this Act.

Act May 30, 1908, c. 229, § 4, 35 Stat. 549.

Rev. St. §§ 5163-5167, mentioned in this section, are set forth above.

Rev. St. §§ 5224-5234, also mentioned in this section, are set forth post.

Status of additional circulating notes; limitations of amount.—Sec. 5. That the additional circulating notes issued under this Act shall be used, held, and treated in the same way as circulating notes of national banking associations heretofore issued and secured by a deposit of United States bonds, and shall be subject to all the provisions of law affecting such notes except as herein expressly modified: Provided, That the total amount of circulating notes outstanding of any national banking association, including notes secured by United States bonds as now provided by law, and notes secured otherwise than by deposit of such bonds, shall not at any time exceed the amount of its unimpaired capital and surplus: And provided further, That there shall not be outstanding at any time circulating notes issued under the provisions of this Act to an amount of more than five hundred millions of dollars.

Act May 30, 1908, c. 229, § 5, 35 Stat. 549.

Additional redemption fund for additional circulating notes outstanding.—Sec. 6. That whenever and so long as any national banking association has outstanding any of the additional circulating notes authorized to be issued by the provisions of this Act it shall keep on deposit in the Treasury of the United States, in addition to the redemption fund required by section three of the Act of June twentieth, eighteen hundred and seventy-four, an additional sum equal to five per centum of such additional circulation at any time outstanding, such additional five per centum to be treated, held and used in all respects in the same manner as the original redemption fund provided for by said section three of the Act of June twentieth, eighteen hundred and seventy-four.

Act May 30, 1908, c. 229, § 6, 35 Stat. 550.

Act June 20, 1874, c. 343, § 3, mentioned in this section, is set forth post, following Rev. St. § 5192.

Distribution of additional circulating notes proportionate to capital and surplus of national banks in each state; emergency assignments of amounts not applied for.—Sec.

7. In order that the distribution of notes to be issued under the provisions of this Act shall be made as equitable as practicable between the various sections of the country, the Secretary of the Treasury shall not approve applications from associations in any State in excess of the amount to which such State would be entitled of the additional notes herein authorized on the basis of the proportion which the unimpaired capital and surplus of the national banking associations in such State bears to the total amount of unimpaired capital and surplus of the national banking associations of the United States: Provided, however, That in case the applications from associations in any State shall not be equal to the amount which the associations of such State would be entitled to under this method of distribution, the Secretary of the Treasury may, in his discretion, to meet an emergency, assign the amount not thus applied for to any applying association or associations in States in the same section of the country.

Act May 30, 1908, c. 229, § 7, 35 Stat. 550.

Information as to securities acceptable to be obtained by Secretary of the Treasury and furnished to national banks.

—Sec. 8. That it shall be the duty of the Secretary of the Treasury to obtain information with reference to the value and character of the securities authorized to be accepted under the provisions of this Act, and he shall from time to time furnish information to national banking associations as to such securities as would be acceptable under the provisions of this Act.

Act May 30, 1908, c. 229, § 8, 35 Stat. 550.

Sec. 9. [Amends Rev. St. § 5214.]

This section amends Rev. St. § 5214, and is set forth post.

Sec. 10. [Amends Act July 12, 1882, c. 290, § 9.]

This section amends Act July 12, 1882, c. 290, § 9, which, as so amended, is set forth above.

Sec. 11. [Amends Rev. St. § 5172.]

This section amends Rev. St. § 5172, and is set forth post, under that section.

Sec. 12. [Relates to redemption of circulating notes.]

This section provides for redemption of circulating notes, under Act June 20, 1874, § 3, and is set forth post, under Rev. St. § 5192.

Authority of Secretary of Treasury as to acts and orders of Comptroller of the Currency and organization and management of associations.—Sec. 13. That all acts and orders of the Comptroller of the Currency and the Treasurer of the United States authorized by this Act shall have the approval of the Secretary of the Treasury who shall have power, also, to make any such rules and regulations and exercise such control over the organization and management of national currency associations as may be necessary to carry out the purposes of this Act.

Act May 30, 1908, c. 229, § 13, 35 Stat. 552.

Secs. 14, 15. [Relate to deposits of public moneys in national banks.]

Sections 14 and 15 of this act relate to deposits of public moneys in national banks as designated depositaries, and are set forth ante, under Rev. St. § 5153.

Appropriation.—Sec. 16. That a sum sufficient to carry out the purposes of the preceding sections of this Act is hereby appropriated out of any money in the Treasury not otherwise appropriated.

Act May 30, 1908, c. 229, § 16, 35 Stat. 552.

Secs. 17–19. [Relate to “National Monetary Commission.”]

Sections 17, 18, and 19 of this act create a National Monetary Commission, prescribe its powers and duties, and make an appropriation for the expenses thereof. They are set forth Comp. St. Supp. 1911, p. 1008.

Limitation of act.—Sec. 20. That this Act shall expire by limitation on the thirtieth day of June, nineteen hundred and fourteen.

Act May 30, 1908, c. 229, § 20, 35 Stat. 553.

Sec. 5168. Comptroller to determine if associations can commence business.—Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to

be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

Act June 3, 1864, c. 106, § 17, 13 Stat. 104.

Sec. 5169. Certificate of authority to commence banking to be issued.—If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title.

Act June 3, 1864, c. 106, §§ 12, 18, 13 Stat. 102, 104.

Sec. 5170. Publication of certificate.—The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is

published in such city or county, then in the newspaper published nearest thereto.

Act June 3, 1864, c. 106, § 18, 13 Stat. 104.

Sec. 5171. [Repealed. Act Aug. 12, 1882, c. 290, § 10.]

This section, as originally enacted, was as follows:

"Upon a deposit of bonds as prescribed by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as hereinafter provided, equal in amount to ninety per centum of the current market-value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of the bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum: Provided, That the amount of circulating notes to be furnished to each association shall be in proportion to its paid-up capital, as follows, and no more:

"First. To each association whose capital does not exceed five hundred thousand dollars, ninety per centum of such capital.

"Second. To each association whose capital exceeds five hundred thousand dollars, but does not exceed one million of dollars, eighty per centum of such capital.

"Third. To each association whose capital exceeds one million of dollars, but does not exceed three million of dollars, seventy-five per centum of such capital.

"Fourth. To each association whose capital exceeds three millions of dollars, sixty per centum of such capital."

It was repealed by Act July 12, 1882, c. 290, § 10, 22 Stat. 165, which further provided as follows:

"That upon a deposit of bonds as described by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, except as modified by section four of an act entitled 'An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes,' approved June twentieth, eighteen hundred and seventy-four, and as modified by section eight, of this act, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as provided by law, equal in amount to ninety per centum of the current market value, not exceeding par, of the United States bonds so transferred and delivered, and at no time shall the total amount of such notes issued to any such association exceed ninety per centum of the amount at such time actually paid in of its capital stock."

The repealing section is superseded by Act March 14, 1900, c. 41, § 12, set forth below, which prescribes the manner in which circulating notes may be issued.

ACT MARCH 14, 1900, c. 41, § 12.

Delivery of circulating notes.—That upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in

the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; and any national banking association now having bonds on deposit for the security of circulating notes, and upon which an amount of circulating notes has been issued less than the par value of the bonds, shall be entitled, upon due application to the Comptroller of the Currency, to receive additional circulating notes in blank to an amount which will increase the circulating notes held by such association to the par value of the bonds deposited, such additional notes to be held and treated in the same way as circulating notes of national banking associations heretofore issued, and subject to all the provisions of law affecting such notes: Provided, That nothing herein contained shall be construed to modify or repeal the provisions of section fifty-one hundred and sixty-seven of the Revised Statutes of the United States, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security: And provided further, That the circulating notes furnished to national banking associations under the provisions of this Act shall be of the denominations prescribed by law, except that no national banking association shall, after the passage of this Act, be entitled to receive from the Comptroller of the Currency, or to issue or reissue or place in circulation, more than one-third in amount of its circulating notes of the denomination of five dollars: And provided further, That the total amount of such notes issued to any such association may equal at any time but shall not exceed the amount at such time of its capital stock actually paid in: And provided further, That under regulations to be prescribed by the Secretary of the Treasury any national banking association may substitute the two per centum bonds issued under the provisions of this Act for any of the bonds deposited with the Treasurer to secure circulation or to secure deposits of public money; and so much of an Act entitled "An Act to enable national banking associations to extend their corporate existence,

and for other purposes," approved July twelfth, eighteen hundred and eighty-two, as prohibits any national bank which makes any deposit of lawful money in order to withdraw its circulating notes from receiving any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid, is hereby repealed, and all other Acts or parts of Acts inconsistent with the provisions of this section are hereby repealed.

Act March 14, 1900, c. 41, § 12, 31 Stat. 49.

This section is part of an act to define and fix the standard of value, to maintain the parity of all forms of money, etc., other sections of which are set forth or referred to, under Rev. St. § 3526 (Comp. St. 1901, p. 2356). It supersedes Act July 12, 1882, c. 290, § 10, 22 Stat. 165, which repealed Rev. St. § 5171, and provided a substitute therefor. It also supersedes so much of section 8 of said act, ante, following Rev. St. § 5167, as limits the circulation of banks having a capital of \$150,000, or less, to ninety per centum of the bonds deposited.

The denominations of circulating notes are prescribed by Rev. St. § 5172.

See, also, Act March 4, 1907, c. 2913, § 2, 34 Stat. 1289 (Comp. St. Supp. 1911, p. 994), which contains a proviso "that nothing in this act shall be construed as affecting the right of any national bank to issue one-third in amount of its circulating notes of the denomination of five dollars as now provided by law."

The two per cent. bonds mentioned in this section are those authorized to be issued by section 11 of this act, ante, following Rev. St. § 3697 (Comp. St. 1901, p. 2478).

The provisions of the act referred to in this section as being repealed were contained in Act July 12, 1882, c. 290, § 9, ante, following Rev. St. § 5167. See note under that section.

Sec. 5172. [Amended. Act May 30, 1908, c. 229, § 11.]

This section, set forth in Comp. St. 1901, p. 3477, is amended by Act May 30, 1908, c. 229, § 11, set forth below.

ACT MAY 30, 1908, c. 229, § 11. [H. R. 21871.]

Amendment of Rev. St. § 5172.—That section fifty-one hundred and seventy-two of the Revised Statutes be, and the same is hereby, amended to read as follows:

Printing, denomination, and form of the circulating notes; preparation and deposit for delivery of additional circulating notes.—"Sec. 5172. In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall

have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, one thousand dollars, and ten thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall state upon their face that they are secured by United States bonds or other securities, certified by the written or engraved signatures of the Treasurer and Register and by the imprint of the seal of the Treasury. They shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signature of the president or vice-president and cashier. The Comptroller of the Currency, acting under the direction of the Secretary of the Treasury, shall as soon as practicable cause to be prepared circulating notes in blank, registered and countersigned, as provided by law, to an amount equal to fifty per centum of the capital stock of each national banking association; such notes to be deposited in the Treasury or in the subtreasury of the United States nearest the place of business of each association, and to be held for such association, subject to the order of the Comptroller of the Currency, for their delivery as provided by law: Provided, That the Comptroller of the Currency may issue national bank notes of the present form until plates can be prepared and circulating notes issued as above provided: Provided, however, That in no event shall bank notes of the present form be issued to any bank as additional circulation provided for by this Act."

Act May 30, 1908, c. 229, § 11, 35 Stat. 551.

This section is part of an act to amend the national banking laws, cited above, the other sections of which are set forth or referred to ante, under Rev. St. § 5167.

The amendment by this section consists in the omission, in the enumeration of the denominations of circulating notes, of the words "one dollar, two dollars, three dollars," and the insertion of the words "ten thousand dollars," with some changes in the language of the clauses prescribing the form and contents of the notes, and in the addition, at the end of the section as originally enacted, of the provisions relating to the preparation, etc., of the additional circulating notes authorized by preceding sections of this act, from the words "The Comptroller of the Currency, acting under the direction of the Secretary of the Treasury," etc., to the end of the section as set forth here.

The charter-number of each banking association is required to be

printed on each circulating note issued, by Act June 20, 1874, c. 343, § 5, set forth below.

The paper used in printing United States notes is required to be used in printing the circulating notes, by Act March 3, 1875, c. 130, § 1, set forth below.

Circulating notes issued to banks after their period of corporate succession has been extended are required to be so printed as to be distinguishable from those issued before said extension, by Act July 12, 1882, c. 290, § 6, ante, following Rev. St. § 5136.

Provisions defining and punishing the forging and uttering of circulating notes are contained in Act March 4, 1909, c. 321, § 149, post, p. 572.

Provisions defining and punishing the trafficking in forged notes are contained in Act March 4, 1909, c. 321, § 154, post, p. 575.

ACT JUNE 20, 1874, c. 343, § 5.

Charter-numbers to be printed on notes.—That the Comptroller of the Currency shall, under such rules and regulations as the Secretary of the Treasury may prescribe, cause the charter-numbers of the association to be printed upon all national-bank notes which may be hereafter issued by him.

Act June 20, 1874, c. 343, § 5, 18 Stat. 124.

This section is part of an act fixing the amount of United States notes, providing for a redistribution of the national bank currency, etc., other sections of which are set forth or referred to post, under Rev. St. § 5192.

ACT MARCH 3, 1875, c. 130, § 1.

Distinctive paper for printing notes.— * * That the national-bank notes shall be printed under the direction of the Secretary of the Treasury, and upon the distinctive or special paper which has been, or may hereafter be, adopted by him for printing United States notes.

Act March 3, 1875, c. 130, § 1, 18 Stat. 372.

This is a proviso of the sundry civil appropriation act for the fiscal year ending June 30, 1876, cited above.

Sec. 5173. Plates and dies to be under control of Comptroller.—The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws respecting the procuring of such notes, and all other expenses of the Bureau of the Currency, shall be paid out of the proceeds of the taxes or duties assessed and col-

lected on the circulation of national banking associations under this Title.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111.

Provisions requiring banks to reimburse the Treasury for the cost of engraving plates ordered by them are contained in Act June 20, 1874, c. 343, § 3, post, following Rev. St. § 5192.

Provisions requiring banks to pay the cost of making plates for their new notes in case they extend their corporate succession are contained in Act July 12, 1882, c. 290, § 6, ante, following Rev. St. § 5136.

Sec. 5174. [*As amended 1877.*] **Annual examination of plates, dies, etc.**—The Comptroller of the Currency shall cause to be examined, each year, the plates, dies, bed-pieces, and other material from which the national-bank circulation is printed, in whole or in part, and file in his Office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed under such regulations as shall be prescribed by the Comptroller of the Currency and approved by the Secretary of the Treasury. The expenses of any such examination or destruction shall be paid out of any appropriation made by Congress for the special examination of national banks and bank-note plates.

Act March 3, 1873, c. 269, § 4, 17 Stat. 603. Act Feb. 27, 1877, c. 69, 19 Stat. 252.

This section is amended by Act Feb. 27, 1877, c. 69, cited above, by striking out, after the words "the plates, dies," the words "but pieces," and substituting therefor the word "bed-pieces," as set forth here.

Sec. 5175. Limit to issue of notes under five dollars.—Not more than one-sixth part of the notes furnished to any association shall be of a less denomination than five dollars. After specie payments are resumed no association shall be furnished with notes of a less denomination than five dollars.

Act June 3, 1864, c. 106, § 22, 13 Stat. 105.

Provisions relating to the limit of the issuance of circulating notes of the denomination of five dollars are contained in Act March 14, 1900, c. 41, § 12, ante, following Rev. St. § 5171.

Sec. 5176. [Repealed. Act July 12, 1882, c. 290, § 10.]

This section, as originally enacted, was as follows:

"No banking association organized subsequent to the twelfth day of July, eighteen hundred and seventy, shall have a circulation in excess of five hundred thousand dollars."

It was repealed by Act July 12, 1882, c. 290, § 10, which enacted

a substitute for Rev. St. § 5171, which in turn was superseded by Act March 14, 1900, c. 41, § 12, ante, following Rev. St. § 5171. See, also, note under said section 5171.

Sec. 5177. [Repealed. Act Jan. 14, 1875, c. 15, § 3.]

This section, as originally enacted, provided that the aggregate amount of circulating notes issued under Act Feb. 25, 1863, c. 58, 12 Stat. 665, Act June 3, 1864, c. 106, 13 Stat. 99, Act July 12, 1870, c. 252, § 1, 16 Stat. 251, and this Title, should not exceed \$354,000,000. It is repealed by Act Jan. 14, 1875, c. 15, § 3, set forth below.

ACT JAN. 14, 1875, c. 15, § 3.

Aggregate amount of circulating notes not limited.—That section five thousand one hundred and seventy-seven of the Revised Statutes of the United States, limiting the aggregate amount of circulating-notes of national banking-associations, be, and is hereby, repealed; and each existing banking-association may increase its circulating-notes in accordance with existing law without respect to said aggregate limit; and new banking-associations may be organized in accordance with existing law without respect to said aggregate limit; and the provisions of law for the withdrawal and redistribution of national-bank currency among the several States and Territories are hereby repealed.
* * [Part of section omitted relates in part to redemption of legal tender notes, and remainder is superseded. Act May 31, 1878, c. 146.]

Act Jan. 14, 1875, c. 15, § 3, 18 Stat. 296.

This section is part of an act providing for the resumption of specie payments, other sections of which are set forth or referred to following Rev. St. § 3575 (Comp. St. 1901, p. 2389). It repeals Rev. St. § 5177.

Part of that portion of the section omitted here relates to the redemption of legal-tender notes, and the issue and sale of bonds, and is set forth following Rev. St. § 3575 (Comp. St. 1901, p. 2389).

The other part of the omitted portion is superseded by Act May 31, 1878, c. 146, set forth following Rev. St. § 3582 (Comp. St. 1901, p. 2397). It provided that "whenever, and so often, as circulating notes shall be issued to any such banking association, so increasing its capital or circulating notes, or so newly organized as aforesaid, it shall be the duty of the Secretary of the Treasury to redeem the legal-tender United States notes in excess only of three hundred million of dollars, to the amount of eighty per centum of the sum of national bank notes so issued to any such banking association as aforesaid, and to continue such redemption as such circulating notes are issued until there shall be outstanding the sum of three hundred million dollars of such legal tender United States notes, and no

more." The superseding act prohibits the further cancellation and retirement of United States legal tender notes.

Rev. St. §§ 5178, 5179, 5180, and 5181, and Act June 20, 1874, c. 343, §§ 7, 8, 9, are also superseded by this section. See notes under those sections, and also note under said sections 7, 8, and 9, post, under Rev. St. § 5192.

Sec. 5178. [Superseded. Act Jan. 14, 1875, c. 15, § 3.]

This section, as originally enacted, was as follows:

"One hundred and fifty millions of dollars of the entire amount of circulating notes authorized to be issued shall be apportioned to associations in the States, in the Territories, and in the District of Columbia, according to representative population. One hundred and fifty millions shall be apportioned by the Secretary of the Treasury among associations formed in the several States, in the Territories, and in the District of Columbia, having due regard to the existing banking capital, resources, and business of such States, Territories, and District. The remaining fifty-four millions shall be apportioned among associations in States and Territories having, under the apportionments above prescribed, less than their full proportion of the aggregate amount of notes authorized, which made due application for circulating notes prior to the twelfth day of July, eighteen hundred and seventy-one. Any remainder of such fifty-four millions shall be issued to banking associations applying for circulating notes in other States or Territories having less than their proportion."

It is superseded by Act Jan. 14, 1875, c. 15, § 3, ante, under Rev. St. § 5177. See note under said superseding section, and also note under Act June 20, 1874, c. 343, §§ 7, 8, 9, post, under Rev. St. § 5192.

Sec. 5179. [Superseded. Act Jan. 14, 1875, c. 15, § 3.]

This section, as originally enacted, was as follows:

"In order to secure a more equitable distribution of the national banking currency, there may be issued circulating notes to banking associations organized in States and Territories having less than their proportion, and the amount of circulation herein authorized shall, under the direction of the Secretary of the Treasury, as it may be required for this purpose, be withdrawn, as herein provided, from banking associations organized in States having more than their proportion, but the amount so withdrawn shall not exceed twenty-five million dollars: Provided, That no circulation shall be withdrawn under the provisions of this section until after the fifty-four millions granted in the first section of the act of July twelfth, eighteen hundred and seventy, shall have been taken up."

It is superseded by Act Jan. 14, 1875, c. 15, § 3, ante, under Rev. St. § 5177. See note under said superseding section, and also note under Act June 20, 1874, c. 343, §§ 7, 8, 9, post, under Rev. St. § 5192.

Sec. 5180. [Repealed. Act Jan. 14, 1875, c. 15, § 3.]

This section, as originally enacted, was as follows:

"The Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, make a statement showing the amount of

circulation in each State and Territory, and the amount necessary to be withdrawn from each association, and shall forthwith make a requisition for such amount upon such associations, commencing with those having a circulation exceeding one million of dollars, in States having an excess of circulation, and withdrawing their circulation in excess of one million of dollars, and then proceeding proportionately with other associations having a circulation exceeding three hundred thousand dollars, in States having the largest excess of circulation, and reducing the circulation of such associations in States having the greatest proportion in excess, leaving undisturbed the associations in States having a smaller proportion, until those in greater excess have been reduced to the same grade, and continuing thus to make such reductions until the full amount of twenty-five millions has been withdrawn; and the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same. Upon failure of any association to return the amount of circulating notes so required, within one year, the Comptroller shall sell at public auction, having given twenty days' notice thereof in one daily newspaper printed in Washington and one in New York City, an amount of the bonds deposited by that association as security for its circulation, equal to the circulation required to be withdrawn from the association and not returned in compliance with such requisition; and he shall, with the proceeds, redeem so many of the notes of such association, as they come into the Treasury, as will equal the amount required and not returned; and shall pay the balance, if any, to the association."

It is repealed by Act Jan. 14, 1875, c. 15, § 3, ante, under Rev. St. § 5177. See note under said repealing section, and also note under Act June 20, 1874, c. 343, §§ 7, 8, 9, post, under Rev. St. § 5192.

Sec. 5181. [Superseded. Act Jan. 14, 1875, c. 15, § 3.]

This section, as originally enacted, was as follows:

"Any association located in any State having more than its proportion of circulation may be removed to any State having less than its proportion of circulation, under such rules and regulations as the Comptroller of the currency, with the approval of the Secretary of the Treasury, shall prescribe: Provided, That the amount of the issue of said banks shall not be deducted from the issue of fifty-four millions mentioned in section five thousand one hundred and seventy-eight."

It is superseded by Act Jan. 14, 1875, c. 15, § 3, ante, under Rev. St. § 5177. See note under said superseding section.

Sec. 5182. For what demands national bank notes may be received.—After any association receiving circulating notes under this Title has caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States,

except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency.

Act June 3, 1864, c. 106, § 23, 13 Stat. 106.

National bank notes shall be received at par for debts and demands owing by the United States, with certain exceptions, ante, Rev. St. § 3475.

Provisions requiring the redemption of lost or stolen notes put in circulation without the signature or upon the forged signature of the proper officers are contained in Act July 28, 1892, c. 317, post, following Rev. St. § 5192.

Sec. 5183. [*As amended 1875.*] **Issue of other notes prohibited.**—No national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the provisions of this Title.

Act June 3, 1864, c. 106, § 23, 13 Stat. 106. Act. Feb. 18, 1875, c. 80, 18 Stat. 320.

This section is amended by Act Feb. 18, 1875, c. 80, cited above, by adding, after the words "shall issue," the words "post notes or," as set forth here.

Sec. 5184. Destroying and replacing worn-out and mutilated notes.—It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or surrendered to be canceled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certificate of such burning, signed by the parties so appointed, shall be made in the books of the Comptroller, and a duplicate thereof forwarded to the association whose notes are thus canceled.

Act June 3, 1864, c. 106, § 24, 13 Stat. 106.

Provisions relating to the destruction of national bank notes by maceration, and repealing so much of this section as requires such notes

to be burned, are contained in Act June 23, 1874, c. 455, § 1, ante, p. 476.

Sec. 5185. Organization of associations to issue gold notes authorized.—Associations may be organized in the manner prescribed by this Title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit circulating notes of different denominations, but none of them of less than five dollars, and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable. But no such association shall have a circulation of more than one million of dollars.

Act July 12, 1870, c. 282, § 3, 16 Stat. 252.

Provisions relating to the removal of the limitation restricting the circulation of banking associations issuing notes payable in gold are contained in Act Jan. 19, 1875, c. 19, set forth below.

Provisions authorizing the conversion of national gold banks into currency banks are contained in Act Feb. 14, 1880, c. 25, post, following Rev. St. § 5186.

ACT JAN. 19, 1875, c. 19.

An Act to Remove the Limitation Restricting the Circulation of Banking-Associations Issuing Notes Payable in Gold. (18 Stat. 302.)

Removal of limitation on circulation of gold banks.—Be it enacted, &c., That so much of section five thousand one hundred and eighty-five of the Revised Statutes of the United States as limits the circulation of banking-associations, organized for the purpose of issuing notes payable in gold, severally to one million dollars, be, and the same is hereby, repealed; and each of such existing banking-associations may increase its circulating-notes, and new banking-associations may be organized, in accordance with existing law, without respect to such limitation.

Act Jan. 19, 1875, c. 19, 18 Stat. 302.

Sec. 5186. Their lawful money reserve, and duty of receiving notes of other associations.—Every association organized under the preceding section shall at all times keep

on hand not less than twenty-five per centum of its outstanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold-notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this Title: Provided, That, in applying the same to associations organized for issuing gold-notes, the terms "lawful money" and "lawful money of the United States" shall be construed to mean gold or silver coin of the United States; and the circulation of such associations shall not be within the limitation of circulation mentioned in this Title.

Act July 12, 1870, c. 282, §§ 3-5, 16 Stat. 252, 253.

ACT FEB. 14, 1880, c. 25.

An Act Authorizing the Conversion of National Gold Banks. (21 Stat. 66.)

Conversion of national gold banks into currency banks.
—Be it enacted, &c., That any national gold bank organized under the provisions of the laws of the United States, may, in the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the Revised Statutes of the United States, for the conversion of banks incorporated under the laws of any State, cease to be a gold bank, and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations: Provided, That all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank.

Act Feb. 14, 1880, c. 25, 21 Stat. 66.

Sec. 5187. Penalty for issuing circulating notes to unauthorized associations.—No officer acting under the provisions of this Title shall countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this Title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of

a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years.

Act June 3, 1864, c. 106, § 27, 13 Stat. 107.

Secs. 5188, 5189. [Repealed. Act March 4, 1909, c. 321, § 341.]

These sections, set forth in Comp. St. 1901, p. 3484, are incorporated in the act to codify, etc., the penal laws, Act March 4, 1909, c. 321, in chapter 7, §§ 175, 176, post, p. 576, thereof, and are expressly repealed by chapter 15, § 341, of said act, taking effect January 1, 1910. Said act is set forth in Comp. St. Supp. 1911, under Title LXIXA, "Criminal Code."

CHAPTER THREE—REGULATION OF THE BANKING BUSINESS

Sec.

5190. Place of business.

5191. "Lawful-money reserve" prescribed.

5192. What may be counted toward the "lawful-money reserve."

Act June 20, 1874, c. 343.

1. [Relates to designation of banking act.]

2. "Lawful-money reserve" to be determined by deposits.

3. Reserve in Treasury for redemption of circulation; redemption of circulating notes.

4. [Relates to withdrawal of circulating notes.]

5. [Relates to printing of circulating notes.]

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7-9. [Superseded.]

Act March 3, 1875, c. 130, § 3.

Clerical force for redemption of circulating notes.

Act March 3, 1887, c. 378.

1. [As amended, Act March 3, 1903, c. 1014.] Additional "reserve cities of 25,000 inhabitants."

2. Additional "central reserve cities."

3. [Amends Act Jan. 14, 1875, c. 15, § 3.]

Act July 14, 1890, c. 708, § 6.

Disposition of money deposited for and redemption of circulating notes.

Act July 28, 1892, c. 317.

Redemption of lost or stolen circulating notes.

Sec.

Act May 30, 1908, c. 229, § 12.

Redemption by Treasury of circulating notes in lawful money.

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Sec.	Sec.
Act July 12, 1882, c. 290, § 13. Punishment for falsely certifying checks, etc.	5214. [As amended, Act May 30, 1908, c. 229, § 9.] Taxes on circulating notes; increase of rate on notes secured otherwise than by bonds of United States; monthly returns of amount of notes so secured; disposition of taxes thereon received.
5209. Embezzlement; penalty.	Act March 14, 1900, c. 41, § 13. Tax on circulating notes.
5210. List of shareholders, etc., to be kept.	5215. Half-yearly return of circulation, deposits, and capital stock.
5211. Reports to Comptroller of the Currency.	5216. Penalty for failure to make return.
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5212. Report as to dividends.	5218. Refunding excessive duties.
5213. Penalty for failure to make reports.	5219. State taxation.
Act June 30, 1876, c. 156, § 6. Reports of savings banks and savings and trust companies.	

Sec. 5190. Place of business.—The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate.

Act June 3, 1864, c. 106, § 8, 13 Stat. 101.

Provisions relating to change of place of business are contained in Act May 1, 1886, c. 73, § 2, ante, following Rev. St. § 5134.

Sec. 5191. "Lawful-money reserve" prescribed.—Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation, and of its deposits. Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its circulation and deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion, between the aggregate amount of its

outstanding notes of circulation and deposits and its lawful money of the United States, has been restored. And the Comptroller of the Currency may notify any association, whose lawful-money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four.

Act June 3, 1864, c. 106, § 31, 13 Stat. 108. Act March 1, 1872, c. 22, 17 Stat. 32.

This section is amended by Act June 20, 1874, c. 343, § 2, post, following Rev. St. § 5192, by providing that the banking associations named shall not be required to keep on hand any amount of money whatever by reason of the amount of their respective circulations, but that the moneys required to be kept on hand by said associations shall be determined by the amount of their deposits solely, as provided by this section.

Upon application in writing by three-fourths of the national banks located in any city having a population of 25,000, asking that the name of such city be added to the cities named in this and the following section, the Comptroller may grant the application, and every bank located in such city must keep on hand the reserve fund required by this section in the manner prescribed herein and by section 5195, by Act March 3, 1887, c. 378, § 1, as amended by Act March 3, 1903, c. 1014, post, following Rev. St. § 5192.

Upon application in writing by three-fourths of the national banks in any city having a population of 200,000, asking that such city may be a "central reserve city," as provided by Rev. St. § 5195, the Comptroller may grant the application, and every bank located in such city must thereupon have on hand twenty-five per cent. of its deposits, as provided by this section, by Act March 3, 1887, c. 378, § 2, post, following Rev. St. § 5192.

Provisions relating to the redemption of circulating notes at the Treasury are contained in Act June 20, 1874, c. 343, § 3, Act March 3, 1875, c. 130, § 3, Act July 14, 1890, c. 708, § 6, post, following Rev. St. § 5192.

Provisions relating to the redemption of circulating notes of banks, extending their period of corporate succession, issued prior to such extension, are contained in Act July 12, 1882, c. 290, § 6, ante, following Rev. St. § 5136.

Treasury notes issued in accordance with the provisions of Act July 14, 1890, 26 Stat. 289 (Comp. St. 1901, p. 2354), may be counted as part of the lawful reserve.

So, also, gold certificates. Act March 2, 1911, c. 190, § 1, 36 Stat. 964 (Comp. St. Supp. 1911, p. 54). See also Act July 12, 1882, c. 290, § 12, 22 Stat. 165, and Act March 14, 1900, c. 41, § 6, 31 Stat. 47 (Comp. St. 1901, pp. 140, 141).

Sec. 5192. What may be counted toward the "lawful-money reserve."—Three-fifths of the reserve of fifteen per centum required by the preceding section to be kept, may consist of balances due to an association, available for the redemption of its circulating notes, from associations approved by the Comptroller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this Title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Richmond, Saint Louis, San Francisco, and Washington. Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house, holding and owning such certificate, within the preceding section.

Act June 3, 1864, c. 106, § 31, 13 Stat. 108.

See note under Rev. St. § 5191.

ACT JUNE 20, 1874, c. 343.

An Act Fixing the Amount of United States Notes, Providing for a Redistribution of the National-Bank Currency, and for Other Purposes. (18 Stat. 123.)

Be it enacted, etc., [Sec. 1. Relates to designation of banking act.]

This section provides that Act June 3, 1864, c. 106, shall be designated as the "national bank act," and is set forth ante, following Rev. St. § 5133.

"Lawful-money reserve" to be determined by deposits.—
Sec. 2. That section thirty one of the "the national-bank act" be so amended that the several associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever, by reason of the amount of their respective circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects, as provided for in the said section.

Act June 20, 1874, c. 343, § 2, 18 Stat. 123.

Section 31 of the "national-bank act," mentioned in this section, is incorporated into Rev. St. §§ 5191, 5192.

Reserve in Treasury for redemption of circulation; redemption of circulating notes.—Sec. 3. That every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars, or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating-notes so redeemed. And all notes of national banks worn, defaced, mutilated, or otherwise unfit for circulation shall, when received by any assistant treasurer or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption as provided herein. And when such redemptions have been so reimbursed, the circulating-notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed and replaced as now provided by law: Provided, That each of said associations shall re-imburse to the Treasury the charges for transportation, and the costs for assorting such notes; and the associations hereafter organized shall also severally re-imburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer:

And provided further, That so much of section thirty-two of said national-bank act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed.

Act June 20, 1874, c. 343, § 3, 18 Stat. 123.

The provisions of section 32 of the "national-bank act," mentioned in this section, are incorporated into Rev. St. § 5195.

The manner of destroying circulating notes is prescribed by Act June 23, 1874, c. 455, ante, p. 476.

Provisions relating to the appointment of a clerical force to carry out the provisions of this section are contained in Act March 3, 1875, c. 130, § 3, set forth below.

Other provisions relating to the redemption of circulating notes at the Treasury are contained in Act July 14, 1890, c. 708, § 6, set forth below. Said provisions, however, are not applicable to deposits made under the requirements of this section.

Circulating notes presented to the Treasury for redemption are to be redeemed in lawful money, by Act May 30, 1908, c. 229, § 12, set forth below.

Sec. 4. [Relates to withdrawal of circulating notes.]

This section authorizes the withdrawal of circulating notes in whole or in part, and is set forth ante, following Rev. St. § 5167.

Sec. 5. [Relates to printing of circulating notes.]

This section requires the charter-number of each association to be printed on each of its notes, and is set forth ante, following Rev. St. § 5172.

Sec. 6. [Relates to United States notes.]

This section limits the circulation of United States notes, and is set forth following Rev. St. § 3582 (Comp. St. 1901, p. 2397).

Secs. 7-9. [Superseded. Act Jan. 14, 1875, c. 15, § 3.]

Section 7 of this act repealed part of Rev. St. § 5179, and provided for the withdrawal of a certain amount of the circulating notes to secure an equitable distribution thereof among the several States.

Section 8 provided for the sale of bonds deposited to secure the circulation in case of a refusal or neglect to comply with the requisitions made by the Comptroller for the withdrawal of circulating notes as provided for by section 7.

Section 9 provided for a redistribution of the currency withdrawn.

All these sections are superseded by Act Jan. 14, 1875, c. 15, § 3, ante, under Rev. St. § 5177.

ACT MARCH 3, 1875, c. 130, § 3.

Clerical force for redemption of circulating notes.—That to carry into effect the provisions of section three of the act entitled "An act fixing the amount of United States

notes, providing for a redistribution of the national-bank currency, and for other purposes" approved June twentieth, eighteen hundred and seventy-four, the Secretary of the Treasury is authorized to appoint the following force, to be employed under his direction, namely: In the Office of the Treasurer: * *

In the Office of the Comptroller of the Currency: * *

And at the end of each month, the Secretary of the Treasury shall re-imburse the Treasury to the full amount paid out under the provisions of this section by transfer of said amount from the deposit of the national banking-associations with the Treasury of the United States; and at the end of each fiscal year he shall transfer from said deposit to the Treasury of the United States such sum as may have been actually expended under his direction for stationery, rent, fuel, light, and other necessary incidental expenses which have been incurred in carrying into effect the provisions of the said section of the above-named act.

Act March 3, 1875, c. 130, § 3, 18 Stat. 399.

This section is part of the sundry civil appropriation act for the fiscal year ending June 30, 1876, cited above.

Act June 20, 1874, c. 343, § 3, mentioned in this section, is set forth above.

ACT MARCH 3, 1887, c. 378, § 1.

[Amended. Act March 3, 1903, c. 1014.]

This section is amended by Act March 3, 1903, c. 1014, set forth below.

ACT MARCH 3, 1903, c. 1014.

An Act to Amend Section One of an Act Entitled "An Act to Amend Sections Fifty-One Hundred and Ninety-One and Fifty-One Hundred and Ninety-Two of the Revised Statutes of the United States, and for Other Purposes." (32 Stat. 1223.)

Amendment of Act March 3, 1887, c. 378, § 1.—Be it enacted, &c., That section one of an Act entitled "An Act to amend sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the Revised Statutes of the United States, and for other purposes," approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended to read as follows:

Additional "reserve cities" of 25,000 inhabitants. "That whenever three-fourths in number of the national banks located in any city of the United States having a popula-

tion of twenty-five thousand people shall make application to the Comptroller of the Currency, in writing, asking that the name of the city in which such banks are located shall be added to the cities named in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the Revised Statutes, the Comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-five of the Revised Statutes."

Act March 3, 1903, c. 1014, 32 Stat. 1223.

The amendment by this act of March 3, 1887, c. 378, § 1, as set forth in Comp. St. 1901, p. 3490, consists in reducing the limit of population of cities which may become reserve cities from 50,000 to 25,000.

ACT MARCH 3, 1887, c. 378, § 2.

Additional "central reserve cities."—Sec. 2. That whenever three-fourths in number of the national banks located in any city of the United States having a population of two hundred thousand people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a central reserve city, like the city of New York, in which one-half of the lawful-money reserve of the national banks located in other reserve cities may be deposited, as provided in section fifty-one hundred and ninety-five of the Revised Statutes, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one of the Revised Statutes.

Act March 3, 1887, c. 378, § 2, 24 Stat. 560.

See note under Rev. St. § 5191.

Sec. 3. [Amends Act Jan. 14, 1875, c. 15, § 3.]

This section amends Act Jan. 14, 1875, c. 15, § 3, following Rev. St. § 3575 (Comp. St. 1901, p. 2389), which relates to the redemption of legal-tender notes.

ACT JULY 14, 1890, c. 708, § 6.

Disposition of money deposited for and redemption of circulating notes.—That upon the passage of this act the balances standing with the Treasurer of the United States

to the respective credits of national banks for deposits made to redeem the circulating notes of such banks, and all deposits thereafter received for like purpose, shall be covered into the Treasury as a miscellaneous receipt, and the Treasury of the United States shall redeem from the general cash in the Treasury the circulating notes of said banks which may come into his possession subject to redemption; and upon the certificate of the Comptroller of the Currency that such notes have been received by him and that they have been destroyed and that no new notes will be issued in their place, reimbursement of their amount shall be made to the Treasurer, under such regulations as the Secretary of the Treasury may prescribe from an appropriation hereby created, to be known as 'National bank notes: Redemption account, but the provisions of this act shall not apply to the deposits received under section three of the act of June twentieth, eighteen hundred and seventy-four, requiring every National bank to keep in lawful money with the Treasurer of the United States a sum equal to five per centum of its circulation, to be held and used for the redemption of its circulating notes; and the balance remaining of the deposits so covered shall, at the close of each month, be reported on the monthly public debt statement as debt of the United States bearing no interest.

Act July 14, 1890, c. 708, § 6, 26 Stat. 289.

This section is part of an act directing the purchase of silver bullion, and the issue of Treasury notes thereon, etc., other sections of which are set forth or referred to following Rev. St. § 3526 (Comp. St. 1901, p. 2354).

Act June 20, 1874, c. 343, § 3, mentioned in this section, is set forth above.

ACT JULY 28, 1892, c. 317.

An Act to Amend the National Bank Act in Providing for the Redemption of National Bank Notes Stolen from or Lost by Banks of Issue. (27 Stat. 322.)

Redemption of lost or stolen circulating notes.—Be it enacted, &c., That the provisions of the Revised Statutes of the United States, providing for the redemption of national bank notes, shall apply to all national bank notes that have been or may be issued to, or received by, any national bank, notwithstanding such notes may have been lost by or stolen from the bank and put in circulation with-

out the signature or upon the forged signature of the president or vice-president and cashier.

Act July 28, 1892, c. 317, 27 Stat. 322.

ACT MAY 30, 1908, c. 229, § 12. [H. R. 21871.]

Redemption by Treasury of circulating notes in lawful money.—That circulating notes of national banking associations, when presented to the Treasury for redemption, as provided in section three of the Act approved June twentieth, eighteen hundred and seventy-four, shall be redeemed in lawful money of the United States.

Act May 30, 1908, c. 229, § 12, 35 Stat. 552.

This section is part of an act to amend the national banking laws, other sections of which are set forth or referred to ante, under Rev. St. § 5167.

Act June 20, 1874, c. 343, § 3, mentioned in this section, is set forth above.

Sec. 5193. [Repealed. Act March 14, 1900, c. 41, § 6.]

This section authorized the Secretary of the Treasury to receive United States notes on deposit, without interest, from any national bank, in sums of not less than ten thousand dollars, and issue certificates therefor in denominations of not less than five thousand dollars, payable on demand in United States notes at the place where the deposits were made, and provided that the notes so deposited should not be counted as part of the lawful money reserve of the association, but that the certificates issued might be so counted, and might be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made. It is repealed by Act March 14, 1900, c. 41, § 6, ante, following Rev. St. § 254 (Comp. St. 1901, p. 141).

Sec. 5194. [Superseded. Act March 14, 1900, c. 41, § 6.]

This section, as originally enacted, was as follows:

“The power conferred on the Secretary of the Treasury, by the preceding section, shall not be exercised so as to create any expansion or contraction of the currency. And United States notes for which certificates are issued under that section, or other United States notes of like amount, shall be held as special deposits in the Treasury, and used only for the redemption of such certificates.”

It is dependent for its operative effect on Rev. St. § 5193, which is repealed by Act March 14, 1900, c. 41, § 6, and therefore becomes inoperative. See note under Rev. St. § 5193.

Sec. 5195. Place for redemption of circulating notes to be designated.—Each association organized in any of the cities named in section fifty-one hundred and ninety-one shall select, subject to the approval of the Comptroller of the Currency, an association in the city of New York, at which it will redeem its circulating notes at par; and may

keep one-half of its lawful-money reserve in cash deposits in the city of New York. But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. Each association not organized within the cities named, shall select, subject to the approval of the Comptroller, an association in either of the cities named, at which it will redeem its circulating notes at par. The Comptroller shall give public notice of the names of the associations selected, at which redemptions are to be made by the respective associations, and of any change that may be made of the association at which the notes of any association are redeemed. Whenever any association fails either to make the selection or to redeem its notes as aforesaid, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided for in section fifty-two hundred and thirty-four, to wind up its affairs. But this section shall not relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand.

Act June 3, 1864, c. 106, § 32, 13 Stat. 109.

That part of this section which requires or permits national banks to redeem their circulating notes elsewhere than at their own counters is repealed by Act June 20, 1874, c. 343, § 3, ante, following Rev. St. § 5192.

Other cities may be made "central reserve cities," by Act March 3, 1887, c. 378, § 2, ante, following Rev. St. § 5192. See note under Rev. St. § 5191.

Sec. 5196. National banks to receive notes of other national banks.—Every national banking association formed or existing under this Title, shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold.

Act June 3, 1864, c. 106, § 32, 13 Stat. 109. Act July 12, 1870, c. 282, § 5, 16 Stat. 253.

Sec. 5197. Limitation upon rate of interest which may be taken.—Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district

where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Act June 3, 1864, c. 106, § 30, 13 Stat. 108.

Sec. 5198. [*As amended 1875.*] **Consequences of taking usurious interest; [jurisdiction of suits by or against national banks.]**—The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Act June 3, 1864, c. 106, § 30, 13 Stat. 108. Act Feb. 18, 1875, c. 80, 18 Stat. 320.

This section is amended by Act Feb. 18, 1875, c. 80, cited above, by adding, at the end of the section as originally enacted, the provisions beginning with the words, "That suits, actions, and proceedings," etc., to the end of the section as set forth here.

Provisions relating to jurisdiction of actions by and against national

banks are contained in Act July 12, 1882, c. 290, § 4, ante, following Rev. St. § 5136.

As to jurisdiction of district courts and citizenship of national banks for purposes of actions, Act March 3, 1911, c. 231, § 24 (16), ante, p. 468.

Sec. 5199. Dividends.—The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half-year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

Act June 3, 1864, c. 106, § 33, 13 Stat. 109.

Sec. 5200. [Amended. Act June 22, 1906, c. 3516.]

This section is amended by Act June 22, 1906, c. 3516, to read as set forth below.

ACT JUNE 22, 1906, c. 3516. [H. R. 8973.]

An Act to Amend Section Fifty-Two Hundred, Revised Statutes of the United States, Relating to National Banks. (34 Stat. 451.)

Amendment of Rev. St. § 5200.—Be it enacted, &c., That section fifty-two hundred of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

Limit to liabilities which may be incurred by any one person, etc. “Sec. 5200. The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such associations, actually paid in and unimpaired and one-tenth part of its unimpaired surplus fund: Provided, however, That the total of such liabilities shall in no event exceed thirty per centum of the capital stock of the association. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed.”

Act June 22, 1906, c. 3516, 34 Stat. 451.

Rev. St. § 5200, amended by this act, is set forth in Comp. St. 1901, p. 3494. The amendment consists principally in the insertion, after the words “actually paid in,” contained in the section as originally en-

acted, of the words "and unimpaired and one-tenth part of its unimpaired surplus fund: Provided, however, That the total of such liabilities shall in no event exceed thirty per centum of the capital stock of the association," as set forth here.

Sec. 5201. Associations not to loan or purchase their own stock.—No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four.

Act June 3, 1864, c. 106, § 35, 13 Stat. 110.

Sec. 5202. Limit upon indebtedness to be incurred.—No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserved profits.

Act June 3, 1864, c. 106, § 36, 13 Stat. 110.

Sec. 5203. Restriction upon use of circulating notes.—No association shall, either directly or indirectly, pledge or hypothecate any of its notes or circulation, for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

Act June 3, 1864, c. 106, § 37, 13 Stat. 110.

Sec. 5204. Prohibition upon withdrawal of capital.—No association, or any member thereof, shall, during the time

it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

Act June 3, 1864, c. 106, § 38, 13 Stat. 110.

Sec. 5205. [*As amended 1876.*] **Enforcing payment of deficiency in capital stock.**—Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a news-

paper of the city or town in which the bank is located, or in a newspaper published nearest thereto,) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

Act March 3, 1873, c. 269, § 1, 17 Stat. 603. Act June 30, 1876, c. 156, § 4, 19 Stat. 64.

This section is amended by Act June 30, 1876, c. 156, § 4, cited above, by adding, at the end of the section as originally enacted, the proviso, as set forth here.

Sec. 5206. Restriction upon use of notes of other banks.

—No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation, the notes of any bank or banking association which are not, at any such time, receivable, at par, on deposit, and in payment of debts by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States.

Act June 3, 1864, c. 106, § 39, 13 Stat. 111.

Sec. 5207. United States notes not to be held as collateral, etc.; penalty.—No association shall hereafter offer or receive United States notes or national-bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one-third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable for a further sum equal to one-quarter of the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit.

Act Feb. 19, 1869, c. 32, 15 Stat. 270.

Sec. 5208. Penalty for falsely certifying checks.—It shall be unlawful for any officer, clerk, or agent of any national

banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four.

Act March 3, 1869, c. 135, 15 Stat. 335.

Provisions prescribing the punishment for falsely certifying checks are contained in Act July 12, 1882, c. 290, § 13, set forth below.

ACT JULY 12, 1882, c. 290, § 13.

Punishment for falsely certifying checks, etc.—That any officer, clerk, or agent of any national-banking association who shall willfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.

Act July 12, 1882, c. 290, § 13, 22 Stat. 166.

This section is part of an act to enable national banking associations to extend their corporate existence, etc., other sections of which are set forth or referred to ante, following Rev. St. § 5136.

Sec. 5209. Embezzlement; penalty.—Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit,

draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section; shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

Act June 3, 1864, c. 106, § 55, 13 Stat. 116. Act April 6, 1869, c. 11, 16 Stat. 7. Act July 8, 1870, c. 226, 16 Stat. 195.

Sec. 5210. List of shareholders, etc., to be kept.—The President and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business-hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency.

Act June 3, 1864, c. 106, § 40, 13 Stat. 111.

Sec. 5211. [As amended 1877.] Reports to Comptroller of the Currency.—Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where

such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.

Act June 3, 1864, c. 106, § 34, 13 Stat. 109. Act March 3, 1869, c. 130, § 1, 15 Stat. 326. Act Feb. 27, 1877, c. 69, 19 Stat. 252.

This section is amended by Act Feb. 27, 1877, c. 69, cited above, by striking out, after the words "resources and liabilities of the," the word "associations," and substituting therefor the word "association," as set forth here.

The verification required by this section may be made before a notary public or other state officer, having an official seal, and authorized to administer oaths, by Act Feb. 26, 1881, c. 82, set forth below.

All savings banks and savings and trust companies organized under acts of Congress are subject to the provisions of this and the two following sections, by Act June 30, 1876, c. 156, § 6, post, following Rev. St. § 5213.

ACT FEB. 26, 1881, c. 82.

An Act Defining the Verification of Returns of National Banks. (21 Stat. 352.)

Verification of reports.—Be it enacted, &c., That the oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven: Provided, That the officer administering the oath is not an officer of the bank.

Act Feb. 26, 1881, c. 82, 21 Stat. 352.

Sec. 5212. Report as to dividends.—In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such dividend, and the amount of net earnings in excess of such div-

ident. Such reports shall be attested by the oath of the president or cashier of the association.

Act March 3, 1869, c. 130, § 2, 15 Stat. 327.

See note under Rev. St. § 5211.

Sec. 5213. Penalty for failure to make reports.—Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States.

Act March 3, 1869, c. 130, §§ 1, 2, 15 Stat. 326.

See note under Rev. St. § 5211.

ACT JUNE 30, 1876, c. 156, § 6.

Reports of savings banks and savings and trust companies.—That all savings-banks or savings and trust companies organized under authority of any act of Congress shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish, all the reports which national banking-associations are required to make and publish under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve and fifty-two hundred and thirteen, of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalty may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located and all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings

or other banks: Provided, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars.

Act June 30, 1876, c. 156, § 6, 19 Stat. 64.

This section is part of an act authorizing the appointment of receivers of national banks, etc., other sections of which are set forth or referred to post, following Rev. St. § 5238.

Sec. 5214. [Amended. Act May 30, 1908, c. 229, § 9.]

This section, set forth in Comp. St. 1901, p. 3500, is amended by Act May 30, 1908, c. 229, § 9, set forth below.

ACT MAY 30, 1908, c. 229, § 9. [H. R. 21871.]

Amendment of Rev. St. § 5214.—Sec. 9. That section fifty-two hundred and fourteen of the Revised Statutes, as amended, be further amended to read as follows:

Taxes on circulating notes; increase of rate on notes secured otherwise than by bonds of United States; monthly returns of amount of notes so secured; disposition of taxes thereon received.—“Sec. 5214. National banking associations having on deposit bonds of the United States, bearing interest at the rate of two per centum per annum, including the bonds issued for the construction of the Panama Canal, under the provisions of section eight of ‘An Act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans,’ approved June twenty-eighth, nineteen hundred and two, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds; and such associations having on deposit bonds of the United States bearing interest at a rate higher than two per centum per annum shall pay a tax of one-half of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds. National banking associations having circulating notes secured otherwise than by bonds of the United States shall pay for the first month a tax at the rate of five per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax of one per centum per annum for each month until a tax of ten per centum per annum is reached, and

thereafter such tax of ten per centum per annum, upon the average amount of such notes. Every national banking association having outstanding circulating notes secured by a deposit of other securities than United States bonds shall make monthly returns, under oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average monthly amount of its notes so secured in circulation; and it shall be the duty of the Comptroller of the Currency to cause such reports of notes in circulation to be verified by examination of the banks' records. The taxes received on circulating notes secured otherwise than by bonds of the United States shall be paid into the Division of Redemption of the Treasury and credited and added to the reserve fund held for the redemption of United States and other notes."

Act May 30, 1908, c. 229, § 9, 35 Stat. 550.

This section is part of an act to amend the national banking laws, the other sections of which are set forth or referred to under Rev. St. § 5167.

Rev. St. § 5214, amended by this section, is set forth in Comp. St. 1901, p. 3500.

Provisions similar to those of this section as amended, relating to the tax on notes based upon deposit of 2 per cent. bonds, are contained in Act March 14, 1900, c. 41, § 13, following this section.

Previous provisions similar to those of this section as amended, relating to the tax on notes based upon deposit of Panama Canal bonds, were contained in Act Dec. 21, 1905, c. 3, § 1, 34 Stat. 5 (Comp. St. Supp. 1911, p. 1053).

Every national banking association is required to pay a tax of ten per centum on the amount of notes of any person, firm, association other than a national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them, by Act Feb. 8, 1875, c. 36, § 20, ante, under Rev. St. §§ 3412, 3413.

Provisions relating to the taxation of banks other than national banks are contained in Rev. St. §§ 3407-3417, and acts set forth thereunder.

ACT MARCH 14, 1900, c. 41, § 13:

Tax on circulating notes.—That every national banking association having on deposit, as provided by law, bonds of the United States bearing interest at the rate of two per centum per annum, issued under the provisions of this Act, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based

upon the deposit of said two per centum bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of the Revised Statutes.

Act March 14, 1900, c. 41, § 13, 31 Stat. 49.

This section is part of an act to define and fix the standard of value, to maintain the parity of all forms of money, etc., other sections are set forth or referred to under Rev. St. § 3526 (Comp. St. 1901, p. 2356).

Sec. 5215. Half-yearly return of circulation, deposits, and capital stock.—In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111.

Sec. 5216. Penalty for failure to make return.—Whenever any association fails to make the half-yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association, by the Comptroller of the Currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the Treasurer may deem best.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111.

Sec. 5217. Penalty for failure to pay duties.—Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the

amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111.

Sec. 5218. Refunding excessive duties.—In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

Res. March 2, 1867, No. 49, 14 Stat. 572.

Sec. 5219. State taxation.—Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Act June 3, 1864, c. 106, § 41, 13 Stat. 111. Act Feb. 10, 1868, c. 7, 15 Stat. 34.

CHAPTER FOUR—DISSOLUTION AND RECEIVERSHIP

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Sec. 5220. Voluntary dissolution of associations.—Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.

Act June 3, 1864, c. 106, § 42, 13 Stat. 112.

The shareholders' individual liability, as prescribed by Rev. St. § 5151, may be enforced by any creditor of any bank which has gone into liquidation under the provisions of this section, by Act June 30, 1876, c. 156, § 2, post, following Rev. St. § 5238.

Sec. 5221. Notice of intent to dissolve.—Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment.

Act June 3, 1864, c. 106, § 42, 13 Stat. 112.

Sec. 5222. Deposit of lawful money to redeem outstanding circulation.—Within six months from the date of the vote to go into liquidation, the association shall deposit with

the Treasurer of the United States, lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account.

Act June 3, 1864, c. 106, §§ 42, 43, 13 Stat. 112. Act July 14, 1870, c. 257, 16 Stat. 274.

Sec. 5223. Exemption as to an association consolidating with another.—An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation.

Act July 14, 1870, c. 257, 16 Stat. 274.

Sec. 5224. [*As amended 1875.*] Reassignment of bonds and redemption of notes, etc.—Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure payment of its notes shall be re-assigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the United States. And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative.

Act June 3, 1864, c. 106, § 42, 13 Stat. 112. Act Feb. 18, 1875, c. 80, 18 Stat. 320.

This section is amended by Act Feb. 18, 1875, c. 80, cited above, by inserting at the end of the section as originally enacted, the provisions

beginning with the words, "And if any such bank shall fail," etc., to the end of the section as set forth here.

Provisions relating to redeeming circulating notes in the ordinary course of business are set forth in chapter 3 of this Title.

Sec. 5225. [*As amended 1877.*] **Destruction of redeemed notes.**—Whenever the Treasurer has redeemed any of the notes of an association which has commenced to close its affairs under the five preceding sections, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and burned in the manner prescribed in section fifty-one hundred and eighty-four.

Act June 3, 1864, c. 106, § 43, 13 Stat. 112. Act Feb. 27, 1877, c. 69, 19 Stat. 252.

This section is amended by Act Feb. 27, 1877, c. 69, cited above, by striking out, after the words "its affairs under the," the word "six," and substituting therefor the word "five," as set forth here.

Provisions relating to the maceration of national bank notes, and repealing so much of Rev. St. § 5184, and this section as provides for the burning of the same, are contained in Act June 23, 1874, c. 455, § 1, ante, p. 476.

Sec. 5226. Mode of protesting notes.—Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes

more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

Act June 3, 1864, c. 106, § 46, 13 Stat. 113.

Sec. 5227. Examination by special agent.—On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

Act June 3, 1864, c. 106, § 47, 13 Stat. 114.

Sec. 5228. [As amended 1875.] Continuing business after default.—After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.

Act June 3, 1864, c. 106, § 46, 13 Stat. 113. Act Feb. 18, 1875, c. 80, 18 Stat. 320.

This section is amended by Act Feb. 18, 1875, c. 80, cited above, by striking out, after the words "and notice," the words "of forfeiture of the bonds," and substituting therefor the word "thereof," as set forth here.

Sec. 5229. Notice to holders; redemption at Treasury; cancellation of bonds.—Immediately upon declaring the bonds of an association forfeited for non-payment of its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such

association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid.

Act June 3, 1864, c. 106, § 47, 13 Stat. 114.

Sec. 5230. Sale of bonds at auction.—Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of canceling its bonds cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

Act June 3, 1864, c. 106, §§ 47, 48, 13 Stat. 114.

Sec. 5231. Sale of bonds at private sale.—The Comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market-value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four.

Act June 3, 1864, c. 106, § 49, 13 Stat. 114.

Sec. 5232. Disposal of protested notes.—The Secretary of the Treasury may, from time to time, make such regu-

lations respecting the disposition to be made of circulating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper.

Act June 3, 1864, c. 106, § 47, 13 Stat. 114.

Sec. 5233. Cancellation of national bank notes.—All notes of national banking associations presented at the Treasury of the United States for payment shall, on being paid, be canceled.

Act June 3, 1864, c. 106, § 47, 13 Stat. 114.

Sec. 5234. Appointment of receivers.—On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver, shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.

Other provisions relating to the appointment, powers, and duties of receivers and agents are contained in Act June 30, 1876, c. 156, as amended by Act Aug. 3, 1892, c. 360, and Act March 2, 1897, c. 354, and Act March 29, 1886, c. 28, post, following Rev. St. § 5238.

Sec. 5235. Notice to present claims.—The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may

have claims against such association to present the same, and to make legal proof thereof.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.

See note under Rev. St. § 5234.

Sec. 5236. Dividends.—From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.

Sec. 5237. Injunction upon receivership.—Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

Act June 3, 1864, c. 106, § 50, 13 Stat. 114.

See note under Rev. St. § 5234.

Sec. 5238. Fees and expenses.—All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied

to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

Act June 3, 1864, c. 106, § 51, 13 Stat. 115.

See note under Rev. St. § 5234, and also acts set forth below.

ACT JUNE 30, 1876, c. 156. [*As amended 1892, 1897.*]

An Act Authorizing the Appointment of Receivers of National Banks, and for Other Purposes. (19 Stat. 63.)

Receivers for banks violating law, failing to pay judgments, or becoming insolvent.—Be it enacted, &c., That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes.

Act June 30, 1876, c. 156, § 1, 19 Stat. 63.

A national bank may not be adjudged an involuntary bankrupt. Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (Comp. St. Supp. 1911, p. 1494).

Enforcement of shareholders' individual liability by creditors.—Sec. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all

other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

Act June 30, 1876, c. 156, § 2, 19 Stat. 63.

Shareholders' meeting; continuance of receivership or appointment of agent; winding up business; distribution of assets.—Sec. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the

same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his pro-

ceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

First. To pay the expenses of the execution of the trust to the date of such payment.

Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by

each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent.

Act June 30, 1876, c. 156, § 3, 19 Stat. 63. Act Aug. 3, 1892, c. 360, 27 Stat. 345. Act March 2, 1897, c. 354, 29 Stat. 600.

This section, as originally enacted, was as follows:

"That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such associations, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise, or compound the debts due to such association upon the order of a competent court of record or of the United States circuit court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association,

sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards."

It was amended by Act Aug. 3, 1892, c. 360, cited above, to read as follows:

"That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders, who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by a ballot in person or by proxy, each share of stock entitling the holder to one vote and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust and shall sell, dispose of, or otherwise collect the assets of the said association and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall by the vote of a majority of the stock in value and number of shares determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided, and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the

hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such association, and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. At such meeting, held as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made, from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

It is again amended by Act March 2, 1897, c. 354, cited above, to read as set forth here.

Provisions relating to the purchase by receivers of property of the banks are contained in Act March 29, 1886, c. 28, set forth below.

Sec. 4. [Amends Rev. St. § 5205.]

Sec. 5. [Relates to counterfeit notes.]

This section requires all counterfeit notes to be marked with the word "counterfeit," "altered," or "worthless," and is set forth ante, p. 477.

Sec. 6. [Relates to reports of savings banks or savings and trust companies.]

This section requires all savings banks or savings and trust companies organized under any act of Congress to make reports to the Comptroller, and is set forth ante, following Rev. St. § 5213.

ACT MARCH 29, 1886, c. 28.

An Act Additional to "An Act to Provide a National Currency Secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption Thereof" Passed June Third, Eighteen Hundred and Sixty-Four. (24 Stat. 8.)

Purchase by receiver of property of bank; request to Comptroller.—Be it enacted, &c., That whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

Act March 29, 1886, c. 28, § 1, 24 Stat. 8.

Approval of request.—Sec. 2. That such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement

of approvals, shall be filed with the Treasurer of the United States.

Act March 29, 1886, c. 28, § 2, 24 Stat. 8.

Payment.—Sec. 3. That whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended, and allowed and for the purpose for which such allowance was made: Provided, however, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order.

Act March 29, 1886, c. 28, § 3, 24 Stat. 8.

Sec. 5239. Penalty for violation of this Title.—If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Act June 3, 1864, c. 106, § 53, 13 Stat. 116.

See note under Rev. St. § 5234.

Sec. 5240. [As amended 1875.] Appointment of occasional examiners; [compensation.]—The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association,

who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. That all persons appointed to be examiners of national banks not located in the redemption-cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined; and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations, and persons appointed to make examination of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided.

Act June 3, 1864, c. 106, § 54, 13 Stat. 116. Act Feb. 19, 1875, c. 89, 18 Stat. 329.

This section is amended by Act Feb. 19, 1875, c. 89, cited above, by striking out, after the words "of the association to the Comptroller," the words: "Every person appointed to make such examination shall receive for his services at the rate of five dollars for each day by him employed in such examination, and two dollars for every twenty-five miles he shall necessarily travel in the performance of his duty, which shall be paid by the association by him examined. But no person shall be appointed to examine the affairs of any banking association of

which he is a director or other officer,"—and by substituting therefor the provisions beginning with the words, "That all persons appointed to be examiners," etc., to the end of the section as set forth here.

Sec. 5241. Limit of visitorial powers.—No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice.

Act June 3, 1864, c. 106, § 54, 13 Stat. 116.

Sec. 5242. Transfers, when void.—All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Act June 3, 1864, c. 106, § 52, 13 Stat. 115.

Sec. 5243. Use of the title "national."—All banks not organized and transacting business under the national-currency laws, or under this Title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings-banks authorized by Congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is committed or repeated.

Act March 3, 1873, c. 269, § 3, 17 Stat. 603.

CRIMES

OFFENSES AGAINST THE OPERATIONS OF GOVERNMENT.

Sec.

83. National banks contributing for political elections; penalty for; additional to officers.

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Sec.

154. Buying, selling, or dealing in forged bonds, notes, etc.
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178. Notes of less than one dollar not to be issued.

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215. Using mails to promote frauds; counterfeit bank notes, etc.
216. Using fraudulent fictitious address.
Act March 4, 1909, c. 321.

National banks contributing for political elections; penalty for; additional to officers.—Sec. 83. It shall be unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for, or any election by any State legislature of a United States Senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be fined not more than five thousand dollars; and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

Act March 4, 1909, c. 321, § 83, 35 Stat. 1103 (Comp. St. Supp. 1911, p. 1613).

See Act Jan. 26, 1907, c. 420, 34 Stat. 864.

"Obligation or other security of the United States" defined.—Sec. 147. The words "obligation or other security of the United States" shall be held to mean all bonds, cer-

tificates of indebtedness, national-bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress.

Act March 4, 1909, c. 321, § 147, 35 Stat. 1115.

See Rev. St. § 5413, Comp. St. 1901, p. 3662, Supp. 1911, p. 1631.

Forging or counterfeiting securities; punishment for.—

Sec. 148. Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than five thousand dollars and imprisoned not more than fifteen years.

Act March 4, 1909, c. 321, § 148, 35 Stat. 1115.

See Rev. St. § 5414, Comp. St. 1901, p. 3662, Supp. 1911, p. 1631.

Counterfeiting national-bank notes; punishment for.—

Sec. 149. Whoever shall falsely make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or whoever shall pass, utter, or publish, or attempt to pass, utter, or publish, any false, forged or counterfeited note purporting to be issued by any such association doing a banking business knowing the same to be falsely made, forged, or counterfeited; or whoever shall falsely alter, or cause or procure to be falsely altered, or shall willingly aid or assist in falsely altering, any such circulating notes, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true any falsely altered or spurious circulating note issued, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be fined not more than one thousand dollars and imprisoned not more than fifteen years.

Act March 4, 1909, c. 321, § 149, 35 Stat. 1115.

See Rev. St. § 5415, Comp. St. 1901, p. 3662, Supp. 1911, p. 1631.

Using plates to print notes without authority, etc.; distinctive paper without authority; punishment for.—Sec. 150. Whoever, having control, custody, or possession of

any plate, stone, or other thing, or any part thereof, from which has been printed or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or whoever by any way, art, or means shall make or execute, or cause or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security or any part thereof; or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or whoever shall print, photograph, or in any other manner make or execute, or cause to be printed photographed, made, or executed, or shall aid in printing, photographing, making, or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States or shall bring into the United

States or any place subject to the jurisdiction thereof, from any foreign place any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than fifteen years, or both.

Act March 4, 1909, c. 321, § 150, 35 Stat. 1116.

See Rev. St. § 5430, Comp. St. 1901, p. 3671, Supp. 1911, p. 1632.

Uttering, etc., forged obligations; punishment for.—Sec. 151. Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than five thousand dollars and imprisoned not more than fifteen years.

Act March 4, 1909, c. 321, § 151, 35 Stat. 1116.

See Rev. St. § 5431, Comp. St. 1901, p. 3671, Supp. 1911, p. 1633.

Taking impressions of tools, implements, etc.; punishment for.—Sec. 152. Whoever, without authority from the United States, shall take, procure, or make, upon lead, foil, wax, plaster, paper, or any other substance or material, an impression, stamp, or imprint of, from, or by the use of any bedplate, bedpiece, die, roll, plate, seal, type, or other tool, implement, instrument, or thing used or fitted or intended to be used in printing, stamping, or impressing, or in making other tools, implements, instruments, or things to be used or fitted or intended to be used in printing, stamping, or impressing any kind or description of obligation or other security of the United States now authorized or hereafter to be authorized by the United States, or circulating note or evidence of debt of any banking association under the laws thereof, shall be fined not more than

five thousand dollars, or imprisoned not more than ten years, or both.

Act March 4, 1909, c. 321, § 152, 35 Stat. 1117.

See Rev. St. § 5432, Comp. St. 1901, p. 3672, Supp. 1911, p. 1633.

Having unlawful possession of impressions; punishment for.—Sec. 153. Whoever, with intent to defraud, shall have in his possession, keeping, custody, or control, without authority from the United States, any imprint, stamp, or impression taken or made upon any substance or material whatsoever of any tool, implement, instrument, or thing, used, or fitted or intended to be used, for any of the purposes mentioned in the preceding section; or whoever, with intent to defraud, shall sell, give, or deliver any such imprint, stamp, or impression to any other person, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

Act March 4, 1909, c. 321, § 153, 35 Stat. 1117.

See Rev. St. § 5433, Comp. St. 1901, p. 3672, Supp. 1911, p. 1633.

Dealing in counterfeit securities; punishment for.—Sec. 154. Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited or altered obligation or other security of the United States or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.

Act March 4, 1909, c. 321, § 154, 35 Stat. 1117.

See Rev. St. § 5434, Comp. St. 1901, p. 3673, Supp. 1911, p. 1633.

Circulating bills of expired banks; punishment for; circulation permitted.—Sec. 174. In all cases where the charter of any corporation which has been or may be created by Act of Congress has expired or may hereafter expire, if any director, officer, or agent of the corporation, or any trustee thereof, or any agent of such trustee, or any person having in his possession or under his control the property of the corporation for the purpose of paying or redeeming its notes and obligations, shall knowingly issue, reissue, or utter as money, or in any other way knowingly put in circulation any bill, note, check, draft or other security purporting to have been made by any such corporation

whose charter has expired, or by any officer thereof, or purporting to have been made under authority derived therefrom, or if any person shall knowingly aid in any such act, he shall be fined not more than ten thousand dollars, or imprisoned not more than five years, or both. But nothing herein shall be construed to make it unlawful for any person, not being such director, officer, or agent of the corporation, or any trustee thereof, or any agent of such trustee, or any person having in his possession or under his control the property of the corporation for the purpose hereinbefore set forth, who has received or may hereafter receive such bill, note, check, draft, or other security, bona fide and in the ordinary transactions of business, to utter as money or otherwise circulate the same.

Act March 4, 1909, c. 321, § 174, 35 Stat. 1122.

See Rev. St. § 5437, Comp. St. 1901, p. 3673, Supp. 1911, p. 1640.

Imitating national-bank notes with advertisements thereon; punishment for.—Sec. 175. It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate or use any business or professional card, notice, placard, circular, handbill, or advertisement in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States which has been or may be issued under any Act of Congress or to write, print, or otherwise impress upon any such note, obligation, or security, any business or professional card, notice or advertisement, or any notice or advertisement of any matter or thing whatever. Whoever shall violate any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.

Act March 4, 1909, c. 321, § 175, 35 Stat. 1122.

See Rev. St. § 5188, Comp. St. 1901, p. 3484, ante, p. 529.

Mutilating, etc., national-bank notes; punishment for.—Sec. 176. Whoever shall mutilate, cut, deface, disfigure, or perforate with holes, or unite or cement together, or do any other thing to any bank bill, draft, note, or other evidence of debt, issued by any national banking association, or shall cause or procure the same to be done, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall

be fined not more than one hundred dollars, or imprisoned not more than six months, or both.

Act March 4, 1909, c. 321, § 176, 35 Stat. 1122.

See Rev. St. § 5189, Comp. St. 1901, p. 3484, ante, p. 529.

Imitating securities or printing advertisements thereon; punishment for.—Sec. 177. It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, handbill, or advertisement, in the likeness or similitude of any bond, certificate of indebtedness, certificate of deposit, coupon, United States note, Treasury note, gold certificate, silver certificate, fractional note, or other obligation or security of the United States which has been or may be issued under or authorized by any Act of Congress heretofore passed or which may hereafter be passed; or to write, print, or otherwise impress upon any such instrument, obligation, or security, any business or professional card, notice, or advertisement, or any notice or advertisement of any matter or thing whatever. Whoever shall violate any provision of this section shall be fined not more than five hundred dollars.

Act March 4, 1909, c. 321, § 177, 35 Stat. 1122.

See Rev. St. § 3708, Comp. St. 1901, p. 2482, Supp. 1911, p. 1641.

Issuing notes less than one dollar; punishment for.—Sec. 178. No person shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation for a less sum than one dollar, intended to circulate as money or to be received or used in lieu of lawful money of the United States; and every person so offending shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

Act March 4, 1909, c. 321, § 178, 35 Stat. 1122.

See Rev. St. § 3583, Comp. St. 1901, p. 2398, Supp. 1911, p. 1641.

Using mails to promote frauds; counterfeit bank notes, etc.; punishment for.—Sec. 215. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or

any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

Act March 4, 1909, c. 321, § 215, 35 Stat. 1130.

See Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, Comp. St. 1901, p. 3696, Supp. 1911, p. 1653.

Using fraudulent fictitious address.—Sec. 216. Whoever, for the purpose of conducting, promoting, or carrying on, in any manner, by means of the post-office establishment of the United States, any scheme or device mentioned in the section last preceding or any other unlawful business whatsoever, shall use or assume, or request to be addressed by, any fictitious, false, or assumed title, name, or address, or name other than his own proper name, or shall take or receive from any post-office of the United States, or station thereof, or any other authorized depository of mail matter, any letter, postal card, package, or

other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be punished as provided in the section last preceding.

Act March 4, 1909, c. 321, § 216, 35 Stat. 1131.

See Act March 2, 1889, c. 393, § 2, Comp. St. 1901, p. 3698, Supp. 1911, p. 1654.

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